92-7

No._____

Supreme Court, U.S.
FILED
JUN 29 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

PREMA JYOTHI, Petitioner,

v.

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, Respondent.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, aka **SCRTD**, a Public Corporation, Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR, OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Prema Jyothi
Petitioner, In Propria Persona
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QUESTIONS PRESENTED

1. All discretionary dismissals, dismissing civil cases without allowing the cases to be heard on their merits, abrogate the constitutional right to a fair trial which is guaranteed by the 7th Amendment to the Constitution of the United States.

Discretionary dismissals are a federal issue because they impact directly on this fundamental constitutional right. If this fundamental constitutional right to trial is to be abrogated by discretionary dismissal of cases, it is important that this be done in full accord with--not in violation of--other fundamental constitutional rights.

Is California handling discretionary dismissals for delay in prosecution in a way which violates plaintiffs' constitutional rights to equal protection and due process under the 14th Amendment to the U.S. Constitution? Are other states also doing this? Is there lack of uniformity of decision, resulting in violation of equal protection and due process, throughout the nation on this issue?

> **1.A.** In determining discretionary dismissals for delay in prosecution, should the presence or absence of prejudice to defendant, attributable to the delay, be considered as a relevant factor along with all other relevant factors? When a delay in prosecution is within the mandatory statutes established by law, should prejudice to defendant be presumed when not affirmatively shown, even when it may not actually be present, or when it may be due to causes other than plaintiff's delay?

[On these points, there are conflicting rulings among the Supreme Courts of 13 states, and 6 of the 13 circuits of the U.S. Courts of Appeal.]

> **1.B.** In the present case, has there been a serious miscarriage of justice and abuse of discretion? Would it be in the public interest to reverse the discretionary dismissal of this case?

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INTRODUCTORY PRAYER

Petitioner Prema Jyothi respectfully prays that a Writ of Certiorari issue from the U.S. Supreme Court to review the case below.

OPINIONS BELOW

On November 8, 1990, the Municipal Court of the Los Angeles Judicial District entered a discretionary dismissal in this case for delay in service of the complaint, although these were served within the mandatory time limit prescribed by California law. (See Appendix No. 1.) Therefore this case has never been heard on its merits.

On June 13, 1991, the Appellate Department of the Superior Court of the County of Los Angeles affirmed the dismissal on appeal with written opinion (Appendix No. 2).

On July 16, 1991, the Appellate Department denied a petition for rehearing (Appendix No. 3). This order also improperly denied certification to the court of appeal. Such certification had not been petitioned for and therefore could not be denied. In California, denial of certification blocks the way to Supreme Court review.

Petitioner, by phone call to the Clerk, requested issuance of a corrected order and asked if a written request had to be submitted. He said he would check with the judges who had issued the order. A corrected order was authorized.

On July 23, 1991, a corrected order was filed, denying rehearing only, leaving the way open for further review (Appendix No. 4).

On January 10, 1992, the Court of Appeal of the State of California, Second Appellate District, Division 4, denied certiorari with written opinion, in effect affirming the dismissal (Appendix No. 5). In California, review of a decision from the Appellate Department of the Superior Court is considered final and non-appealable [California Code of Civil Procedure §904.1(a)(3)], but the Court of Appeal can reverse an Appellate Department decision by granting a writ of certiorari (California Code of Civil Procedure §1068).

On March 11, 1992, the California Supreme Court denied a Petition for Review of this case (Appendix No. 6).

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C.A. § 1257(a) (see Appendix No. 9). Dates of all previous judgments are stated hereinabove.

On May 13, 1992, Justice Sandra D. O'Connor extended the time within which to file this Petition for Writ of Certiorari to and including June 29, 1992 (Appendix No. 7).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

At issue in this case is the Seventh Amendment of the Constitution of the United States, providing for the right to trial in civil suits (Appendix No. 8).

Also at issue is the Fourteenth Amendment to the Constitution of the United States, providing for due process and equal protection of the laws (also Appendix No. 8).

Statutes and court rules involved include: California Code of Civil Procedure (CCP) § 340.3 (Appendix No. 11); CCP §§ 583.130, 583.210(a), 583.410, and 583.420(a)(1) (Appendix No. 12); California Rules of Court, Rule 373(e) (Appendix No. 13); California Government Code §§ 911.2 and 913(b) (Appendix No. 15); California Government Code § 945.4 (Appendix No. 16); and California Penal Code § 135 (Appendix No. 17).

STATEMENT OF CASE

Petitioner Jyothi was a passenger who was injured aboard an SCRTD bus. The basic facts are concisely stated in the Petition for Review presented to the Supreme Court of the State of California in this case. Therefore, the Court is referred to Appendix No. 18, which contains a short but relevant excerpt from the earlier brief describing the basic facts which gave rise to this case.

Federal Nature of Questions Was Timely Raised in Courts Below

In the Municipal Court, issues of whether there was prejudice to defendant from delay in service, and of the untimely destruction of evidence by defendant as the cause for the prejudice claimed by defendant, were raised in Plaintiff's Opposition to Defendant's Motion to Dismiss. The facts that there had been prompt notice to defendant of plaintiff's injuries, by way of timely submission of claims for damages, which had been reviewed and then rejected, were raised in the First Amended Complaint. That justice would best be served by allowing the case to be heard on its merits, instead of dismissed, was also raised in Plaintiff's Opposition to Defendant's Motion to Dismiss.

The actual issues of this case (the circumstances of the injury, application of the doctrine of res ipsa loquitur, SCRTD's liability,

negligence in the operation of the buses and in maintaining the buses, negligent entrustment, breach of contract) have never had a chance to be heard in open court. This case has never been heard on its merits because it was dismissed on discretionary procedural grounds. When the case was dismissed by Municipal Court Judge Bruguera, the emphasis on appeal shifted from the actual issues of the case itself, to whether the dismissal had been fair or proper.

That is, the subject in controversy on appeal became the discretionary dismissal itself.

On appeal to the Appellate Department of the Superior Court, plaintiff protested the dismissal as an abuse of discretion. Issues of whether there was prejudice to defendant from delay in service, and of the untimely destruction of evidence by defendant as the cause for the prejudice claimed by defendant (who also had held that it was not necessary to show any prejudice from delay in service), were again raised in Appellant's Opening Brief.

Plaintiff's prompt notice to defendant by way of claims for damages was also discussed in that brief, as well as a carrier's responsibilities to collect and preserve information related to known injuries of passengers for future litigation.

However, the federal nature of the issues was first raised before the Appellate Department of the Superior Court by way of a Petition for Rehearing after the Appellate Department affirmed the dismissal.

California Rules of Court (CRC) Rule 107 (Appendix No. 14), which governs petitions for rehearing to the Appellate Department, does not restrict or limit the contents of such petitions.

Thus the conflict between the way in which the dismissal had been handled and the Seventh and Fourteenth Amendments to the United States Constitution was raised before and considered by the Appellate Department of the Superior Court in the Petition for Rehearing. (For relevant excerpt, see Appendix No. 19.)

The federal nature of the issues, and the conflict between the way the discretionary dismissal had been handled and the Seventh and Fourteenth Amendments to the Constitution of the United States, were next raised before the Court of Appeal in a Petition for Writ of Certiorari. (For relevant excerpt, see Appendix No. 20.)

The federal nature of the issues, and the conflict between the way the discretionary dismissal had been handled and the Seventh and Fourteenth Amendments to the Constitution of the United States, were next raised before the Supreme Court of the State of California in a Petition for Review. (For relevant excerpt, see Appendix No. 21.)

How the Courts Below Passed on the Federal Questions

The Appellate Department of the Superior Court, after reviewing the Petition for Rehearing, simply ignored the constitutional issues. Its orders denying rehearing (Appendix Nos. 3 and 4) do not deal with any of the issues raised in the Petition for Rehearing.

Its earlier Memorandum Judgment, filed before the constitutional issues were raised, therefore does not pass upon the constitutional issues either. This Memorandum Judgment, in restating plaintiff's case, misstates her case in several places. Plaintiff respectfully called the court's attention to this in her Petition for Rehearing, but her protests were not responded to, other than that the Petition for Rehearing was denied.

The Court of Appeal, after reading and considering the constitutional issues raised in the Petition for Writ of Certiorari, denied the petition "for absence of facts showing entitlement to extraordinary relief." (See its written opinion, Appendix No. 5.)

The Supreme Court of the State of California, to whom the constitutional issues were also submitted, denied review of the case without written opinion (see Appendix No. 6).

In the state of California, are discretionary dismissals being handled in a way which abrogates plaintiffs' constitutional rights, under the Seventh Amendment, to a fair trial in civil suits, in a way which violates their constitutional rights under the Fourteenth Amendment? This issue has been presented to the lower courts in this case but has basically been ignored by them.

However, this issue is serious not only in California but in states and courts across the nation. As shown in the Petition for Review submitted to the California Supreme Court, there are deep rifts between conflicting court of appeal decisions within California on the handling of discretionary dismissals, which the California Supreme Court for unknown reasons has chosen not to resolve.

There are also conflicting decisions among the Supreme Courts of at least 13 states, and at least 6 of the 13 federal circuits of United States Courts of Appeal.

If the Supreme Court of the United States consents to hear this case and resolve these issues, the effects of the much-needed rulings would reverberate throughout the country, affecting not only state Supreme Courts and courts of appeal, but also state superior courts, municipal courts, U.S. Courts of Appeal and U.S. District Courts.

REASONS FOR GRANTING WRIT

Introduction

Discretionary dismissal of a case abrogates the fundamental constitutional right to trial by jury which is set forth in Amendment VII to the United States Constitution. This right to trial has been a cornerstone of American jurisprudence.

American Jurisprudence holds that:

> "The right to have a trial by jury is a fundamental right in our democratic judicial system, including our federal jurisprudence. It is a right which is justly dear to the American people, and whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care."
> (47 Am.Jur.2d 635.)

It is of critical importance, if this fundamental constitutional right is to be abrogated by discretionary dismissals, that this be done in a way which is in accordance with--not in violation of--other constitutional provisions for equal protection and due process, under the Fourteenth Amendment to the United States Constitution. Failure on the part of the lower courts to do this--in California and in courts across the nation--has resulted in widespread miscarriage of justice.

The Supreme Court of the United States is being asked to scrutinize the following issues with utmost care.

I. IN CALIFORNIA, DISCRETIONARY DISMISSALS FOR DELAY IN PROSECUTION ARE BEING HANDLED IN A WAY THAT VIOLATES THE PROVISIONS FOR EQUAL PROTECTION AND DUE PROCESS UNDER THE LAWS, AS GUARANTEED IN THE FOURTEENTH AMENDMENT.

Current California laws provide that an action for personal injury (and a variety of other actions) must be commenced within one year of the occurrence (California Code of Civil Procedure (CCP) § 340.3) (Appendix No. 11), and that a plaintiff then has an additional three years within which to serve the complaint, before the expiration of the mandatory statute of limitations for service [CCP § 583.210(a)] (Appendix No. 12).

With regard to dismissals for delay in prosecution, CCP § 583.130 (Appendix No. 12.) enjoins plaintiffs to proceed with

"reasonable" diligence, but states that "the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action."

Among the various statutes further governing discretionary dismissals, at issue in this particular case is CCP §583.420(a)(1) (Appendix No. 12). Defendant SCRTD specifically brought its Motion to Dismiss the complaint in this case under that specific statute and subsection, which provides that the court may not grant a discretionary dismissal unless service is not made within two years after the action is commenced. The statute neither enjoins nor requires such dismissal, but merely prohibits a court from using its discretion to dismiss an action for delay in service unless such requirement is met.

CCP § 583.410 (Appendix No. 12) provides that a court may have the discretion to dismiss an action for delay in prosecution "on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case", and that such dismissal "shall be pursuant to the procedure and in accordance with the criteria prescribed by the rules adopted by the Judicial Council."

The rule adopted by the Judicial Council, setting forth the procedure and criteria for discretionary dismissal, is California Rules of Court (CRC), Rule 373. CRC Rule 373(e) specifically sets forth the criteria (Appendix No. 13) and relevant matters to be considered by the courts.

Herein lies the problem, or rather, two problems.

First, CRC Rule 373(e) does not mention anywhere, in its listing of "relevant matters," the presence or absence of prejudice to defendant from delay in prosecution. In the absence of any directive regarding this, courts of appeal in California have taken widely differing and conflicting positions regarding whether the existence of prejudice to defendant from delay should be considered at all, and whether such prejudice can be or should be presumed, when not shown, from the fact that there has been a delay.

Second, although CRC Rule 373(e) enjoins courts to "consider all matters relevant to a proper determination of the motion" in arriving at a decision, many courts of appeal in California have chosen instead to consider only plaintiff's causes for delay. If the causes please them, then they consider other relevant matters. If not, they toss the cases out. They do not consider all relevant factors together in arriving at a decision, and freely state so. Further, if the causes for delay do not please them, they then "presume" prejudice to defendant

even where none is affirmatively shown, and dismiss the cases on this basis. Some courts of appeal are more fair, consider all factors together, not presuming prejudice to defendant where none exists.

As a result, in the state of California, there is widely conflicting treatment of similarly situated plaintiffs in discretionary dismissals, which denies them equal protection under the laws, as guaranteed by the Fourteenth Amendment.

In Brown v. Merlo (1973), 8 C.3d 855, 506 P.2d 212, the Supreme Court of California held at 861:

> "This principle of 'equal protection' preserved by both state and federal constitutions . . . does require that, at a minimum, 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment."

In Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111 (1991, 10th Cir.), a federal court held at 1118:

> "A violation of equal protection occurs when the government treats someone differently than another who is similarly situated."

The United States Supreme Court also held basically the same thing in City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985), at 3254:

> "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."

However, plaintiffs in California whose cases come up for possible dismissal are similarly situated with respect to the legitimate purpose of the law, yet they do not receive like treatment.

This has burgeoned into an increasingly serious problem in the fair administration of the laws in California. The applicable statutes and rules provide no specific guidance to the courts on if, how and when to consider the existence of prejudice to defendant from delay, in determining discretionary dismissals. Conflicting lines of case authority on this issue have built up to the point that California court of appeal judges themselves have lamented the conflicting case law, in their written opinions. Petitioner brought this to the attention of the California Supreme Court in her Petition for Review, but the California Supreme Court declined to resolve the problem.

It turns out that this is not merely a California problem.

Across the nation, there are conflicting rulings on this issue

being issued by the Supreme Courts of many states and federal courts of appeal, as discussed in the following section.

II. THERE ARE CONFLICTING RULINGS ISSUED BY THE SUPREME COURTS OF AT LEAST 13 STATES, AND BY UNITED STATES COURTS OF APPEAL IN AT LEAST 6 OF THE 13 FEDERAL CIRCUITS, ON THE ISSUE OF PREJUDICE TO DEFENDANTS FROM DELAY IN DISCRETIONARY DISMISSALS.

Guidance is needed from the Supreme Court of the United States in order to achieve uniformity of opinion on this key issue.

The Supreme Courts of 13 states, including Alaska, Hawaii, Idaho, Illinois, Massachusetts, Minnesota, Missouri, Montana, North Dakota, South Dakota, Utah, West Virginia and Wyoming, have issued conflicting and differing rulings on this crucial issue, which impacts directly on fundamental constitutional rights.

Among the United States Courts of Appeal, conflicting and differing rulings on this issue have been made in the following 6 of the 13 circuits: First Circuit, Second Circuit, Fourth Circuit, Seventh Circuit, Eighth Circuit, and Ninth Circuit.

The positions taken on this issue fall into 15 categories, which are listed below. It is clear is that there is widespread lack of uniformity on this issue.

Under each category below is a list of cases which have taken that particular position on this issue. Many cases fall under more than one category because their rulings contain multiple elements.

A total of forty (40) cases are listed, all of them either from state Supreme Courts or U.S. Courts of Appeal. These decisions span 18 years, some as early as 1974 and as recently as 1991.

Therefore this is both a live and recurring issue.

For an alphabetical list of these 40 cases, including a short quotation from each case delineating its views, see Appendix No. 22. This is for reference purposes, to enable the Court to easily see how each court expressed itself, and to back up the allegations herein.

For the sake of brevity, the cases are listed below only by case name, year of decision, and state Supreme Court or federal circuit. The complete citations for all cases may be found in the Table of Authorities (under the separate heading of **Special List of Conflicting Cases on Prejudice from Delay**) and also Appendix No. 22.

Court Rulings on Prejudice from Delay in Discretionary Dismissals:

1. The failure to prosecute diligently is by itself sufficient justification for a discretionary dismissal for delay in prosecution. No showing of actual prejudice to defendant from delay is necessary. The presence or absence of prejudice to defendant need not even be considered as a factor.

   Anderson v. Air West (1976, 9th Cir.)
   Moore v. Telfon Comm. Corp., (1978, 9th Cir.)
   Nealy v. Transportacion Maritima Mexicana, (1980, 9th Cir.)
   Shackleton v. Neil, (1983, Supreme Court, Montana)

2. Prejudice to defendant from delay in prosecution may be presumed from any delay which the court thinks is "unreasonable" even when no actual prejudice can be affirmatively shown, as grounds for dismissal.

   Anderson v. Air West (1976, 9th Cir.)
   Becky v. Norwest Bank Dillon, N.A., (1990, Supreme Court, Montana)
   Chicago Title Insurance Co. v. Wheat, (1985, Supreme Court, Montana)
   Citizens Utilities Co. v. American Tel. & Tel. Co., (1979, 9th Cir.)
   Cook v. Fergus Electric Cooperative, (1988, Supreme Court, Montana)
   Cox v. Myllmaki, (1988, Supreme Court, Montana)
   Ellis v. Twin Falls Canal, (1985, Supreme Court, Idaho)
   Lyell Theatre Corp. v. Loews Corp., (1982, 2nd Cir.)
   Moore v. Telfon Comm. Corp., (1978, 9th Cir.)
   Nealy v. Transportacion Maritima Mexicana, (1980, 9th Cir.)
   Peters v. Newkirk, (1981, Supreme Court, Montana)
   Power Constructors v. Acres American, (1991, Supreme Court, Alaska)
   Shackleton v. Neil, (1983, Supreme Court, Montana)
   Timber Tracts v. Fergus Electric Cooperative, (1988, Supreme Court, Montana)
   Washington v. Walker, (1984, 7th Cir.)

3. Though prejudice from delay can be presumed from "unreasonable" delay, this presumption is a rebuttable one, and if there is a showing that no actual prejudice occurred, then this is a factor which should be taken into consideration by the court.

Anderson v. Air West (1976, 9th Cir.)

4. Prejudice to defendants resulting from "unreasonable" delay may be presumed, but when delay is more moderate or excusable, the need to show actual prejudice is proportionally greater.

   Lyell Theatre Corp. v. Loews Corp., (1982, 2nd Cir.)
   Power Constructors v. Acres American,
   (1991, Supreme Court, Alaska)

5. Whether actual prejudice to defendants from delay is shown may be an important factor in deciding whether a plaintiff's cause for delay is reasonable or unreasonable.

   Citizens Utilities Co. v. American Tel. & Tel. Co.,
   (1979, 9th Cir.)
   Nealy v. Transportacion Maritima Mexicana,
   (1980, 9th Cir.)

6. If plaintiff comes forward with a reasonable excuse for the delay, burden shifts to defendant to show actual prejudice.

   Becky v. Norwest Bank Dillon, N.A.,
   (1990, Supreme Court, Montana)
   Cox v. Myllmaki, (1988, Supreme Court, Montana)
   Nealy v. Transportacion Maritima Mexicana,
   (1980, 9th Cir.)

7. First cause for delay should be evaluated. If cause for delay is thought to be "reasonable" by the court, then at that point prejudice to defendant should be considered as a factor in deciding on discretionary dismissals.

   Becky v. Norwest Bank Dillon, N.A.,
   (1990, Supreme Court, Montana)
   Cox v. Myllmaki, (1988, Supreme Court, Montana)
   Nealy v. Transportacion Maritima Mexicana,
   (1980, 9th Cir.)

8. Both cause for delay, and prejudice from delay, should be considered together and at the same time, along with other relevant factors, in determining discretionary dismissals for delay in prosecution.

   Cook v. Fergus Electric Cooperative,
   (1988, Supreme Court, Montana)
   Day v. Ciba Geigy Corp., (1989, Supreme Court, Idaho)
   Evans v. Gogo, (1990, Supreme Court, W. Virginia)
   Olympic Sports Prod. v. Universal Athletic Sales Co.,
   (1985, 9th Cir.)
   Systems Associates v. Motorola Com. and Electr.,
   (1989, Supreme Court, Idaho)

9. Presence or lack of actual prejudice to a defendant caused by the delay must be considered as a factor in determining discretionary dismissals for delay in prosecution.

Bonhiver v. Fugelso, Porter et al.,
(1984, Supreme Court, Minn.)
Bush v. United States Postal Service, (1974, 4th Cir.)
Cosme Nieves v. Deshler, (1987, 1st Cir.)
Day v. Ciba Geigy Corp., (1989, Supreme Court, Idaho)
Dept. of Social Services v. Romero,
(1980, Supreme Court, Utah)
Duncan v. Pennington County Housing Authority,
(1986, Supreme Court, South Dakota)
Equal Employment Oppty. Comm. v. Westinghouse,
(1979, 8th Cir.)
Evans v. Gogo, (1990, Supreme Court, W. Virginia)
Fidelity S. & L. Ass'n v. Aetna Life & Cas. Co.,
(1981, 9th Cir.)
Gray v. Johnson, (1980, Supreme Court, W. Virginia)
Hillig v. C.I.R., (1990, 4th Cir.)
K.L.C. Inc. v. McLean, (1982, Supreme Court, Utah)
Mir v. Fosburg, (1983, 9th Cir.)
Monahan v. Washburn, (1987, Supreme Court, Mass.)
Olympic Sports Prod. v. Universal Athletic Sales Co.,
(1985, 9th Cir.)
Randolph v. Hays, (1983, Supreme Court, Wyoming)
Reizakis v. Loy, (1974, 4th Cir.)
Scherer v. Hanson, (1978, Supreme Court, Minn.)
Sickler v. National Dairy Products Corp.
(1977, Supreme Court, Illinois)
State Ex Rel. Webster v. Lehndorff Geneva,
(Supreme Court, Missouri)
Systems Associates v. Motorola Com. and Elec.,
(1989, Supreme Court, Idaho)
Unemployment Compensation Division v. Bjornsrud,
(1977, Supreme Court, North Dakota)
Utah Oil Co. v. Harris, (1977, Supreme Court, Utah)
Westinghouse Elec. Supply v. Paul W. Larsen Contr.,
(1975, Supreme Court, Utah)

10. Actual prejudice from delay in prosecution must be shown or should be shown in order to justify the drastic sanction of discretionary dismissal.

Bonhiver v. Fugelso, Porter et al.,
(1984, Supreme Court, Minn.)

Cosme Nieves v. Deshler, (1987, 1st Cir.)
Day v. Ciba Geigy Corp., (1989, Supreme Court, Idaho)
Equal Employment Opptv. Comm. v. Westinghouse, (1979, 8th Cir.)
Evans v. Gogo, (1990, Supreme Court, W. Virginia)
Gray v. Johnson, (1980, Supreme Court, W. Virginia)
Mir v. Fosburg, (1983, 9th Cir.)
Scherer v. Hanson, (1978, Supreme Court, Minn.)

11. Both actual prejudice and unreasonable delay must be present in order to justify discretionary dismissal for delay in prosecution.

Bonhiver v. Fugelso, Porter et al., (1984, Supreme Court, Minn.)
Evans v. Gogo, (1990, Supreme Court, W. Virginia)
Gray v. Johnson, (1980, Supreme Court, W. Virginia)
Scherer v. Hanson, (1978, Supreme Court, Minn.)

12. Whether there is actual prejudice to defendants from delay, and whether the delay was deliberate, should be important or deciding factors in determining discretionary dismissals.

Bagalay v. Lahaina Restoration Foundation (1978, Supreme Court, Hawaii)
Hillig v. C.I.R., (1990, 4th Cir.)

13. Factors which a court should consider in discretionary dismissals for delay in prosecution are: plaintiff's diligence, actual prejudice to defendant resulting from the delay, availability of alternate sanctions, and existence of a warning to plaintiff that his case was in danger of being dismissed.

Becky v. Norwest Bank Dillon, N.A., (1990, Supreme Court, Montana)

14. Alternate sanctions less severe than dismissal should be considered by the court, and applied where possible, before discretionary dismissal for delay in prosecution is justified.

Bush v. United States Postal Service, (1974, 4th Cir.)
Cosme Nieves v. Deshler, (1987, 1st Cir.)
Hillig v. C.I.R., (1990, 4th Cir.)
Monahan v. Washburn, (1987, Supreme Court, Mass.)

15. An important factor to consider in determining discretionary dismissals is whether an injustice would result from the dismissal.

K.L.C. Inc. v. McLean, (1982, Supreme Court, Utah)
Monahan v. Washburn, (1987, Supreme Court, Mass.)
Sickler v. National Dairy Products Corp. (1977, Supreme Court, Illinois)

Utah Oil Co. v. Harris, (1977, Supreme Court, Utah)
Westinghouse Elec. Supply v. Paul W. Larsen Contr., (1975, Supreme Court, Utah)

Observations:

The most substantial conflict exists between the courts that have held that prejudice may be presumed when not affirmatively shown, as grounds for dismissal (15 courts) and courts that have held that the presence or absence of actual prejudice must be considered as a factor in determining discretionary dismissals for delay in prosecution (24 courts).

Some courts have held that the presence or absence of prejudice to defendant--actual or presumed--need not even be considered at all as a factor.

Some courts have held that actual prejudice must be shown to justify the drastic sanction of dismissal.

One critical difference in rulings is the matter of **when** the presence or absence of any actual prejudice to defendant should be considered. Should it be considered only if--and after--cause for delay has been deemed "reasonable", or should it be considered at the same time as all other relevant factors, for a total understanding of the case at hand?

There are many courts whose holdings fall somewhere between the other holdings in a unique way.

However, there is no court among the 40 listed which does not conflict with some other court among the 40.

In Western & Atlantic Railrd. v. Henderson (1929), 49 S.Ct. 445, 279 U.S. 639, 73 L.Ed. 884, U.S. Supreme Court held at 888:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

What if it is case law that creates a presumption that is arbitrary or that operates to deny a fair opportunity to repel it? Is the case law not then violating the due process clause of the 14th Amendment?

The U.S. Supreme Court is being asked to review this issue and stem the tide of case law which operates as judicial fiat, in violation of due process as set forth in Western & Atlantic. The entire issue of presumption of prejudice from delay in prosecution needs U.S. Supreme Court clarification, to set a clear precedent and stop needless and widespread injustice, including violations of

constitutional rights.

If permitted to file a brief on the merits in this case, Petitioner will endeavor to show the Court which of the many positions would be most in the national interest for courts across the country to take on this issue.

III. A SUPREME COURT RULING ON THIS CASE WOULD CORRECT A MISCARRIAGE OF JUSTICE BY THE COURTS BELOW.

It is interesting that only 5 of the 40 courts listed above held that an important factor in considering discretionary dismissals was whether any injustice would result from the dismissal.

However, injustice has resulted from the discretionary dismissal in the present case. This is partly because of the presumption of prejudice to defendant from the delay in service of the complaint.

Petitioner also holds that the discretionary dismissal of this case was an abuse of discretion. The Hon. Henry J. Friendly (Senior Judge, U.S. Court of Appeals for the Second Circuit) said, quoting from an earlier case, "Rather, we should recognize that 'abuse of discretion,' like 'jurisdiction,' is 'a verbal coat of . . . many colors.'" (31 Emory Law Journal 747 (1982) at 763.)

Petitioner did present causes for delay which were reasonable, and Defendant SCRTD, a public common carrier of passengers, was not prejudiced by the delay itself, which was within the mandatory statute of limitations for service. Rather, it was prejudiced by its failure as a public entity to investigate and preserve investigation results following receipt of timely claims for damages, and its failure as a common carrier of passengers to investigate and preserve basic investigation results following an injury-causing incident.

Defendant SCRTD was also prejudiced by its own questionable and early destruction of relevant records.

SCRTD testified 11 times, in its responses to interrogatories, requests for production, and requests for admissions, that it did not retain the records relevant to this action for more than two years after the incidents. This means that they threw away or destroyed the relevant records only one year after the known statutory time limit for commencing an action for personal injury, which is one year after date of injury (CCP § 340.3). This was also one year before discretionary dismissal would have been possible, and two years before the expiration of the mandatory statute for service (CCP § 583.210(a)].

In other words, the relevant records were destroyed after the claim for damages had been received, but before the expiration of both the discretionary and mandatory statutes of limitations [§ 583.420(a)(1) and § 583.210(a)] for service of a complaint.

SCRTD has given conflicting testimony on bus maintenance records, first testifying in response to a request for production that the requested bus maintenance records no longer existed and that such records were kept for two years only. Later, when asked to confirm this with a request for admissions, they changed the reason, instead saying that the requested maintenance records could not be produced because they could not identify the buses, because records of work assignments were only kept for two years. However, such work records were never needed to identify one of the two buses involved, as it had been identified by Petitioner, both in the claims for damages and First Amended Complaint, by its individual identifying number.

If the requested records were, as SCRTD has testified, destroyed two years after the incidents, then these records were still in SCRTD's possession at the time that the claims for damages were submitted, when an investigation of the claim should have been conducted. The drivers and buses could have easily been identified at the time, and their versions of the incidents noted down. This should have been part of even the most basic investigation. Yet SCRTD has testified that it has none of this basic information.

SCRTD also refused to provide records of other passenger complaints for the same incidents as caused injury to Petitioner, on the grounds that the request was "not calculated to lead to the discovery of relevant evidence and requests information that is clearly inadmissible." (Response to Request for Production of Documents, Set One, p. 3.)

The destroyed records include work assignment records permitting driver identification, and determination as to whether the drivers had been driving on schedules with overloaded hours, as this might have contributed to negligence in operation of the buses. The accidents occurred in 1986.

Petitioner discovered while doing library research for her Appellant's Opening Brief, which was submitted to the Appellate Department, that in 1986 SCRTD was under investigation by the California State Assembly for having extensive problems with more than 480 bus drivers who were driving with expired or suspended licenses, subject to arrest for outstanding warrants against them for traffic violations, who were not licensed to drive buses, or who had outstanding warrants against them for drunken driving. The bus

drivers' union was also at that time suing SCRTD for requiring them to work longer hours than allowed by their contract.

This is documented by articles in the Los Angeles Herald, which Petitioner attached as exhibits to Appellant's Opening Brief.

The Appellate Department acknowledged these articles with only one sentence in its Memorandum Judgment: "Appellant argues further on appeal on various other subjects that are not relevant to the issue presented." (Appendix No. 2, p. A-3.)

SCRTD's early destruction of relevant records could be intentional destruction of evidence in order to evade prosecution for legitimate grievances, a violation of California Penal Code § 135 (Appendix No. 17).

As Petitioner stated in Appellant's Opening Brief to the Appellate Department, pp. 11-12:

> "It seems that Defendant SCRTD is destroying key records quite a bit in advance of when these records would be needed for reference in any civil action, and then claiming prejudice from its lack of records. . . . It is also apparent that the presence of these vanished records might prove more prejudicial to Defendant SCRTD than the absence of these records."

As held in Akiona v. U.S., 938 F.2d 158 (1991, 9th Cir.) at 161, a "trier of fact may draw adverse inference from destruction of evidence relevant to case."

Shouldn't such matters generally be decided in court by a trial on the merits, rather than dismissing a serious case on a procedural technicality?

In controversy in the present case is whether any actual prejudice to defendant's case was caused by the intentional or negligent early destruction of evidence by SCRTD, before the expiration of the discretionary statute of limitations for serving a complaint, or whether the prejudice was caused by Petitioner's delay in service of the complaint until after the expiration of the discretionary statute of limitations for service of the complaint.

In Nealy v. Transportacion Maritima Mexicana, 662 F.2d 1275 (1980, 9th Cir.), the court held at 1281:

> "In discretionary dismissals for delay in prosecution, when evaluating prejudice to defendant, a plaintiff should not be deprived of his cause of action if the missing evidence would have been lost even absent delay. The loss must in some way be causally related to the plaintiff's conduct."

In this case, the loss of evidence which occurred one year before the expiration of the discretionary statute of limitations for

service should not be blamed on Petitioner, as even if she had served the complaint within the discretionary statute of limitations for service, the relevant documents would have already been destroyed.

As Petitioner said in her Petition for Review, submitted to the California Supreme Court, pp. 27-28:

> "At issue in this case is serious misconduct on the part of a large public corporation which serves hundreds of thousands of members of the public every week, and which is supported by taxes as well as by transit fares.
>
> According to 'Facts At A Glance', published by SCRTD on April 1, 1991, SCRTD's average weekday boarding passengers number 1,311,920. Its total annual passengers number 411,820,000. Of its total operating revenue, about 40% is received in fares paid by the public, and about 58% is received from taxes and government grants. Such an agency, supported not only by passenger fares but also by public taxes, should not behave in an irresponsible way towards the public.
>
> If serious misconduct (mishandling of claims for damages, and intentional early destruction of relevant evidence) on the part of this major public corporation is allowed to go unquestioned and uncorrected, the result could be irreparable harm to thousands of people. Why irreparable?
>
> The majority of people who ride the public buses have no other form of transportation, and no other way of getting to and from work. When innocent persons are injured in transit, they may find themselves saddled with large medical bills plus an inability to work due to their injuries.
>
> If SCRTD is allowed to continue to treat their claims for damages in a cavalier way, without conducting basically adequate investigations of claims or retaining the results of such investigations, and if SCRTD is allowed to get away with early destruction of crucial information and records well in advance of known deadlines for service of complaints, then justice or fairness will be out of reach for many innocent passengers injured in transit.
>
> Thousands of people of humble economic means, injured through no fault of their own, have been and will continue to be victimized, not only by the incidents which caused their injuries, but by subsequent misconduct on the part of SCRTD in handling their claims and cases, and by the legal system itself.

The lawyers who handle such personal injury cases at the municipal court level usually do so on a contingency basis--and drop the cases if the cases are dismissed. The lawyers are reluctant to put time and effort into uncertain and iffy appeals with a statistically improbable likelihood of success. Unless, of course, the plaintiffs are willing and able to switch from a contingency basis to an hourly billing rate, something which the average bus passengers of humble means could never afford to do.

Their cases are simply dropped because they cannot afford to pay lawyers thousands of dollars to pursue the elusive butterfly of justice up through the appeals process.

Therefore it is important that such cases be heard fairly at the municipal court level, in full accord with all constitutional provisions and principles. The Supreme Court, by reviewing this case, could ensure that this happens."

IV. A U.S. SUPREME COURT RULING ON THIS CASE WOULD HAVE A BENEFICIAL EFFECT ON THE WAY CLAIMS FOR DAMAGES ARE TREATED BY PUBLIC ENTITIES THROUGHOUT THE COUNTRY.

Like many states, California has a notice of claims requirement which requires timely submission of a claim for damages to any public entity, as prerequisite to the commencement of any formal legal action. (California Government Code § 911.2) (Appendix No. 15).

The possibility of a court action stemming from any rejected claim is so plain that California Government Code § 913(b) (Appendix No. 15) requires that a printed warning be placed on all claims rejections, notifying claimants of the deadline for filing a complaint with the court.

The purposes for this requiring submission of claims for damages, before commencement of any lawsuits, have been set forth by an abundance of case law in California, rather than by statute. As set forth by case law, this requirement is for the purpose of enabling the public entity to conduct prompt and adequate investigations, and to either settle the claims without the expense of needless litigation, or to prepare a defense for the court actions which can stem from any unsettled claim for damages. (Kraincock v. Superior Court (1990), 216 C.A.3d 1473; Elias v. San Bernardino County Flood Control Dist. (1977), 68 C.A.3d 70; State of California v. Superior Court (1978), 86 C.A.3d 475; C.A. Magistretti Co. v. Merced Irrigation Dist. (1972), 27 C.A.3d 270;

Bozaich v. State of California (1973), 32 C.A.3d 688.)

This has parallel in federal law, in the Tort Claims Procedure, 28 U.S.C.A. § 2675(a) (Appendix No. 10), which provides for submission of claims for damages to any federal agency as prerequisite to the institution of lawsuits for personal injury.

Supreme Courts in states other than California have affirmed these purposes of requiring submission of claims for damages to public entities, before commencement of any lawsuits, as shown by the following rulings of the Supreme Courts of Alabama, Connecticut, Illinois, Indiana, Iowa, Maine, Nebraska, New York, Oklahoma, Texas, Virginia and Wisconsin.

Hunnicutt v. City of Tuscaloosa, 337 So.2d 346 (1976, Supreme Court, Alabama) held at 347 that the purpose of the municipal tort notice of claim provisions, which require presentation of claims to public entities before the instigation of lawsuits, was to notify the city of an accident and allow the city to investigate.

Fraser v. Henninger, 376 A.2d 406 (1977, Supreme Court, Connecticut) at 409 that the purpose of notice of claim requirements as prerequisite to any formal lawsuit was to enable the municipality to make a timely investigation of the claim.

Cooney v. Society of Mt. Carmel, 389 N.E.2d 549 (1979, Supreme Court, Illinois) at 550 held, "Purpose of statute requiring presuit notice of tort claims against local governmental entities is to furnish timely notice of injuries so that there can be an investigation and prompt settlement of meritorious claims."

Collier v. Prater, 544 N.E.2d 497 (1989, Supreme Court, Indiana) held at 498 that the "purpose of the notice statute being to advise the city of the accident so that it may promptly investigate the surrounding circumstances."

Indiana State Highway Com'n v. Morris, 528 N.E.2d 468 (1988, Supreme Court, Indiana) held at 471 that the "purposes of the notice statute include informing the officials of the political subdivision with reasonable certainty of the accident and surrounding circumstances so that political division may investigate, determine its possible liability, and prepare a defense to the claim."

McBride v. City of Maywood, 455 N.E.2d 54 (1983, Supreme Court, Illinois) held at 58 that a purpose of the notice of claims requirement was "to allow the governmental entity the opportunity to investigate the scene of the occurrence to determine if it was, in fact, liable and to preserve any pertinent evidence in order to defend against a potential claim."

Cook v. City of Council Bluffs, 264 N.W.2d 784 (1978, Supreme Court, Iowa) held at 789 that the purpose of requiring

submission of claims for damages before lawsuits was "to enable a city to investigate an alleged incident while the facts are fresh."

Faucher v. City of Auburn, 465 A.2d 1120 (1983, Supreme Court, Maine) held at 1120 that the "purposes of the notice requirement under statute governing tort claims brought against public entities are to save needless expense in litigation by providing opportunity for amicable resolution of disputes, and to allow defendant to fully investigate claims and defenses."

Chicago Lumber Co. v. School Dist. No. 71, 417 N.W.2d 757 (1988, Supreme Court, Nebraska) held at 766 that the notice requirement for claims of damages, precedent to filing of lawsuits, "provides an opportunity for the political subdivision to investigate and obtain information about its allegedly tortious conduct, and enables the political subdivision to decide whether to pay the claimant's demand or defend the litigation predicated on the claim made." (Note: this decision is to be made before lawsuit is filed.)

Davidson v. Bronx Municipal Hospital, 473 N.E.2d 761 (1984, Court of Appeals[1], New York) held at 763 that the notice of claims requirement before bringing of lawsuits "serves the salutary purpose of allowing municipal defendants to conduct an investigation and examine the plaintiff with respect to the claim . . . and to determine whether the claims should be adjusted or satisfied before the parties are subjected to the expense of litigation."

Reirdon v. Wilburton Bd. of Ed., 611 P.2d 239 (1980, Supreme Court, Oklahoma) held at 240, "The notice provision furthers legitimate state interests by fostering a prompt investigation while the evidence is still fresh; the opportunity to repair any dangerous condition, quick and amicable settlement of meritorious claims; and preparation of fiscal planning to meet any possible liability."

Graves v. Rose, 663 P.2d 733 (1983, Supreme Court, Oklahoma) held at 734 that "the purposes of the notice provisions are to further legitimate municipal interests by promoting prompt investigation; provide the opportunity to repair any dangerous condition; for speedy and amicable settlement of meritorious claims and to prepare to meet fiscal liabilities."

Artco-Bell Corp. v. City of Temple, 616 S.W.2d 190 (1981, Supreme Court, Texas) held at 192, "The purpose of the notice requirement is to provide the municipality with an opportunity to investigate an accident while facts are fresh and conditions remain

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[1]New York's highest court.

substantially the same, thereby enabling the City to guard against unfounded claims and to settle claims and to prepare for trial."

City of Houston v. Torres, 621 S.W.2d 588, (1981, Supreme Court, Texas) held at 591, "The purpose of the 'notice of claim' requirement . . . is to ensure a prompt reporting of claims to enable the municipality to investigate while facts are fresh and conditions remain substantially the same. Such opportunity to investigate, predicated upon timely reporting of claim of injury, enables the city to gather information needed to guard against unfounded claims, settle claims and prepare for trial."

Town of Crewe v. Marler, 319 S.E.2d 748 (1984, Supreme Court, Virginia) held at 749, that the "purpose of the statute is to enable a city to make a prompt investigation of tort claims, to correct dangerous or defective conditions, and, where justified, to avoid the expense and delay of litigation by making voluntary settlements with claimants."

Nielsen v. Town of Silver Cliff, 334 N.W.2d 242 (1983, Supreme Court, Wisconsin) held at 245: "the notice requirements are designed to ensure that governmental units have a sufficient opportunity to investigate all incidents giving rise to tort claims."

Observations

The Supreme Courts of all the above 12 states have held that one purpose of the notice of claims, required to be submitted to public entities before commencement of any formal litigation, is to enable the public entity to make a prompt investigation. Further, some of the above courts have amplified that claims submitted to public entities, before commencement of lawsuits, enable public entities to conduct investigations while the facts are still fresh, and to either settle the claims or prepare a defense for the possible future lawsuits.

There is no ambiguity in this.

There is logic and common sense behind these rulings, and a concern for the public good.

All of this honorable case law is in accord with the position taken by Petitioner that a public entity should conduct a prompt, adequate investigation in response to a mandatory claim for damages, before service of summons and complaint, and should retain the results of such investigations for future litigation which the public entity plainly knows could stem from any unresolved claim.

All the courts which have so far affirmed the dismissal of the present case have simply brushed off this point of view as

insignificant.

Instead, they have accepted the point of view offered by Defendant SCRTD, that no defendant--whether public entity or private party--has any duty to investigate which precedes the service of the complaint.

Defendant SCRTD's authority for this holding is a California court of appeals case, County of Los Angeles v. Superior Court, 203 C.A.3d 1205 (1988). In that case, plaintiffs had submitted a timely claim for damages to the County for assault and battery, but had delayed in service of the formal complaint, which was still served within the mandatory statute of limitations. A discretionary dismissal was entered in the case, partly due to an unproven inference of prejudice to defendants from the fact that there was a delay in service.

The dismissal was also partly due to the court's refusal to acknowledge that the defendant's receipt of a claim for damages should have made any difference in the County's knowledge of the circumstances of the assault and battery, and the court's opinion that **no investigation need have been conducted by the County in response to such claim.**

County of Los Angeles held at 1212:

> "A defendant has no legal duty to do anything more than meet the plaintiff step by step, **beginning with the service of the summons**. . . . There is no duty to investigate when there is no notice of the filing of a lawsuit." *[Emphasis added.]*

Its references for this holding were not statutes, but earlier cases in which the defendants had been private parties.

The County of Los Angeles court clearly knew it was dealing with a case where the defendant was a public entity, but held that it made no difference whether defendant was a public entity, with prompt notice of injury by way of claims for damages, or a private party. The court held at 1212:

> "The purposes of the dismissal statutes are defeated by the carving out of exceptions to the statutes based on who the defendant is."

However, the whole California Government Code is a "carving out of exceptions to the statutes based on who the defendant is."

The Tort Claims Procedure, 28 U.S.C.A. § 2675(a) (Appendix No. 10), cited earlier in this section, is a "carving out of exceptions to the statutes based on who the defendant is."

Public agencies have special privileges, and with these

privileges come responsibilities.

This County of Los Angeles case has paved the way for irresponsibility on the part of public agencies in the state of California. While public entities can demand early notice of a grievance by way of a claim for damages, why bother to investigate? Without an investigation, there could be no valid basis for accepting or rejecting the claim, but so what? Or, if an investigation is made, why retain the results? Just do a duplicate investigation later at public expense, and then complain of prejudice if some of the needed information--which was earlier available --has since become unavailable.

If decisions by public entities, to accept or reject claims for damages, are made without investigation, then such decisions are made groundlessly, a violation of the public trust.

This also would contravene the whole purpose of the notice of claim statutes for public entities in all states.

The public has to comply with the mandatory requirements to submit timely claims for damages to public entities before commencement of any lawsuits. Members of the public, generally, trust that their claims will be investigated before being accepted or rejected. This is fair and reasonable.

Why, on the one hand, require submission of prompt claims for damages before the commencement of lawsuits, and on the other hand, rule that no investigation of claims is necessary before taking any action on them? What about the distress of claimants who had trustfully assumed that their claims would be investigated and the results retained?

If claims are rejected, information from investigations should be retained for the future litigation which the public entity plainly knows could stem from any unsettled claim for damages.

At the very least, such information should be retained until the expiration of the mandatory statute of limitations for filing and serving complaints, which are well-known by the public entities.

If a public agency does not retain the evidence and information from claims investigations, or instead destroys the relevant records in advance of when these would be needed in any court action stemming from the claims, then later a duplicate investigation would have to be conducted all over again at public expense, an abuse of public funds.

Indeed, later the relevant information might be unavailable, especially when the injury may be related to vehicular malfunction.

What if a public agency does an investigation of a claim, and turns up information which is quite favorable to the public agency.

Do you think they would throw that away? Knowing that a lawsuit could stem from any claim? Of course not--they would keep the **favorable** information and evidence. The only information likely to be thrown away or not retained would be **unfavorable** evidence.

In the present case, Defendant SCRTD relied in part upon the County of Los Angeles holdings to support its position, as well as relying on the view that no affirmative showing of prejudice was necessary because prejudice could be presumed from the delay. In affirming the dismissal, the Appellate Department of the Superior Court also relied partly on County of Los Angeles (see its Memorandum Judgment, Appendix No. 2, p. A-4).

The California Supreme Court declined to review or reverse County of Los Angeles, choosing instead to let the precedent stand (petition for review denied, County of Los Angeles at 1213). This precedent has been followed by courts in numerous cases since, including the present case. The California Supreme Court also declined to review the present case, which asked that the County of Los Angeles precedent be disapproved.

When there is disregard for the purposes of submitting claims for damages to public agencies, injustice results. Such an injustice has occurred in the present case, which needs to be set straight.

If the U.S. Supreme Court reverses the dismissal in this case, it could rely upon the honorable case law established across the nation in affirming the purposes of claims for damages. Such claims are required by law at all levels of government (state laws affecting city and state entities in all states, and 28 U.S.C.A. § 2675(a) affecting federal agencies).

Irresponsible, careless or negligent handling of claims for damages by public agencies is not in the public interest. Fair and responsible handling of claims for damages is.

The U.S. Supreme Court could encourage responsible processing and handling of the mandatory claims for damages by all public agencies, by reviewing this case and reversing the dismissal.

If the U.S. Supreme Court were to express an opinion on this issue, the reverberating ripple effect would be felt throughout the country, not only at all levels of government, but also at all levels of the court system, to the benefit of the public.

V. A U.S. SUPREME COURT RULING ON THIS CASE WOULD IMPROVE THE WAY INJURY-CAUSING INCIDENTS AND ACCIDENTS ARE HANDLED BY MASS TRANSIT, PUBLIC BUS COMPANIES, AIRLINES, TRAINS, BOATS, AND OTHER COMMON CARRIERS OF PASSENGERS THROUGHOUT THE NATION.

Should a common carrier of passengers be responsible for investigating injury-causing incidents and accidents, and preserving the investigation results for possible future litigation which could arise from the accidents? Do these responsibilities precede the service of any formal complaints? Wouldn't it be best for such investigations to begin promptly after the accidents?

Yes. The alternative would be for the injured passengers to be responsible for conducting their own prompt investigations, which would be unrealistic and unfair. Evaluations about the mechanical condition of a carrier's vehicle are technical in nature. This kind of information should be investigated by the carrier immediately, or as soon as possible, and investigation results retained. Even one year later the same information might not be obtainable.

In De Vera v. Long Beach Transportation Co., (1986) C.A.3d 782, a California case involving an accident with a public bus, the court held at 795 that a common carrier does have a duty to collect and preserve accident-related information. It also held that:

> "Conversely, absent such a duty on the part of the carrier, each passenger would be obliged to alight from the carrier's vehicle and seek the requisite information for himself or herself. Such a practice would be unwieldy, unduly time-consuming, and possibly even dangerous. . . . We hold that, following an accident between its vehicle and that of another, **a common carrier has a duty to collect and preserve information concerning the other vehicle and its driver for use by the carrier's passengers in future civil litigation.**" *[Emphasis added.]*

Otherwise, if it is true, as held by the County of Los Angeles court cited earlier, that no defendant--whether public entity or private party--has any responsibility to investigate which precedes service of the summons and complaint, then following an accident with any common carrier (including an airplane crash), the common carrier would have no duty to investigate.

Though this case involves buses, the issues also apply to other common carriers of passengers, including airplanes, boats, trains, mass transit, and other forms of transportation. In any accident involving a common carrier, including accidents where a private party has the

misfortune to collide with a common carrier, passengers can be injured and service of complaints can be delayed. This can then bring the cases under consideration for discretionary dismissal.

It is true that the National Transportation Safety Board investigates major airline crashes, but they do not investigate every crash or "minor" crashes. Also, there are strict regulations regarding the use of their reports in any litigation related to the accidents. In fact, the current Code of Federal Regulations expressly prohibits the use of National Transportation Safety Board reports in litigation [49 U.S.C.A. § 1441(e) (Federal Aviation Act)].

In practice, the National Transportation Safety Board has modified its adherence to this rule a little by dividing its reports into two types. The "Board's accident report" includes analysis of probable causes of an accident and recommendations as to measures which might help prevent such accidents in the future. The "factual accident report" is "an investigator's report of his investigation of the accident." (49 C.F.R. §835.2.) Board employees are permitted to use a "factual accident report" in response to written discovery requests or depositions. They are not permitted to give any expert or opinion testimony, nor can any of their reports be used for this purpose, and they are not allowed to appear in court. "Litigants must obtain their expert witnesses from other sources." (49 C.F.R. § 835.3.)

What this means is that in any litigation arising out of airline accidents, injured passengers cannot completely rely on any investigation which may be (or may not be) conducted by the National Transportation Safety Board. In litigation, the question could arise as to whether the airline, as a common carrier of passengers, has any responsibilities to investigate following an accident, preceding the formal service of a complaint.

The problem is compounded when the common carrier of passengers is also a public entity (a public common carrier). This describes SCRTD, the defendant in the present case.

Such a public common carrier has both the responsibilities of a common carrier of passengers to promptly investigate an injury-causing incident or accident as soon as possible after its occurrence, plus the responsibilities of a public entity to promptly investigate claims for damages before acting on those claims, and retain investigation results.

Such public common carriers include not only public buses, but also public mass transit. (In Los Angeles, both the public buses and the new fixed-rail mass transit services are managed and administered by SCRTD). A Supreme Court opinion expressed in

this case would clearly affect all public mass transit services in every major metropolitan area in the country, in a beneficial way.

In the present case, a miscarriage of justice has occurred involving the carriage of passengers.

If the U.S. Supreme Court reverses this dismissal, and expresses an opinion on this topic, this would affect all common carriers of passengers--and their passengers--throughout the country.

What is in the best interests of all passengers?

Conclusion and Summary

For ease in catching the essence of the issues in this case, reasons for granting the writ are summarized below. However, a fuller and more complete view, including substantiating information, case law and analysis, can be found in the preceding pages of this Petition, which you are encouraged to read. The issues in this case are worthy of U.S. Supreme Court attention for the following reasons:

1. The way in which discretionary dismissals are handled by the courts is a federal issue because all discretionary dismissals impact directly on the constitutional right to trial in civil cases, as guaranteed under the Seventh Amendment to the U.S. Constitution.

2. In California, discretionary dismissals for delay in prosecution are being handled by the courts in a way which is in conflict with equal protection and due process under the laws, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

3. In state Supreme Courts and U.S. Courts of Appeal across the nation, there are conflicts on whether presumption of undemonstrated prejudice to defendant from delays in prosecution should be permitted, in determining discretionary dismissals. There are conflicts on whether prejudice to defendant from delay should be considered at all as a factor, and whether actual prejudice to defendant from delay should be present to justify the drastic sanction of discretionary dismissal and denial of the right to trial.

Petitioner cites 40 cases of conflict on this issue, representing state Supreme Courts from 13 states, and U.S. Courts of Appeal in 6 of the 13 federal circuits. The cited rulings span 18 years, as early as 1974 and as recently as 1991. Therefore this is both a live and recurring issue, involving basic constitutional rights. U.S. Supreme Court review is needed to resolve these conflicts and establish some uniformity of opinion at a national level.

4. In the present case, Petitioner was a passenger who was injured aboard an SCRTD bus, and subsequently reinjured aboard another SCRTD bus while on the way home from a doctor who was

treating her for the injuries sustained in the first incident.

In response to timely, mandatory claims for damages, submitted to SCRTD by Petitioner before commencement of the litigation, SCRTD failed either to conduct a basic investigation or retain any investigation results. This was unknown to Petitioner, who assumed that her claims had been investigated before rejection (she had been contacted by a claims investigator before the rejection), and that basic investigation results would be retained for the litigation which SCRTD plainly knew could stem from any unresolved claim for damages.

She retained an attorney who dropped her case before service of the complaint was accomplished, leaving her in propria persona. This occurred while she was still recovering from and under treatment for her injuries. This also occured in advance of the statute of limitations after which discretionary dismissals became possible, and a deadline which she did not know about at the time. Therefore her former attorney cannot be held responsible for the delay in service. Petitioner was recovering from injuries which included injuries to the spine (back and neck) and she delayed in service of the complaint. Upon reading the complaint her former attorney had filed on her behalf, she found that it had to be rewritten before it could be served, as it did not adequately represent her position or her case.

Her former attorney had told her that she had three years from the date the complaint was filed to serve a complaint on defendants. When she had recovered sufficiently to undertake rewriting of her complaint, she did so, and the resulting rewritten First Amended Complaint was served on defendant within the mandatory statute of limitations for service.

She then decided to continue to handle her case in propria persona, although she is not an attorney and has had no formal education in law. She has a Bachelor of Fine Arts (BFA), is a freelance writer, illustrator and graphic designer, and has done the writing and research for this case from the First Amended Complaint forward. She has worked as a temporary word processing operator and has done all the typing and word processing for her case also. She has spent long hours at the UCLA law library, researching procedures and cases.

She was diligent in prosecution after service was effected, and served Defendant with specially prepared interrogatories, requests for production, and requests for admission.

During the course of discovery, she learned from SCRTD that it claimed to have no records pertaining to her case and had in fact

destroyed records relevant to her case.

She had been inadvertently not in compliance with the discretionary statute of limitations for service of the complaint, and Defendant SCRTD filed for discretionary dismissal for delay in prosecution.

SCRTD held that no showing of actual prejudice from the delay was necessary, as prejudice could be presumed from the delay itself, even though service of the complaint had been effected within the mandatory statute of limitations for service.

Whether there was any actual prejudice to defendant, caused by the delay in service and not due to other causes, is under dispute. Relevant records destroyed by SCRTD include documents which would enable identification of the bus drivers and their driving schedules, and maintenance records for the buses.

There is question of willful destruction of relevant records in order to evade prosecution for legitimate grievances. Possible motives for this, discovered during research, are the facts that in 1986 (when the accidents occurred), SCRTD was under investigation by the California State Assembly for hiring hundreds of drivers who had expired or suspended licenses, were subject to arrest for outstanding warrants against them for traffic violations, who were not licensed to drive buses, or who had outstanding drunk driving warrants. SCRTD was also being sued by the bus drivers' union for requiring drivers to drive more hours than permitted by their contracts.

According to SCRTD's own testimony in response to interrogatories and requests for production, the relevant records were destroyed two years after the incidents, which is one year before discretionary dismissal even became possible in this case.

Petitioner has consistently taken the view that the loss of records could not have been caused by the fact that she delayed in service until after the time at which discretionary dismissals became possible, since the records were destroyed one full year before the time at which discretionary dismissal became possible in this case.

Petitioner holds that the discretionary dismissal in this case was an abuse of discretion, has resulted in an injustice, and should be reversed, thus allowing a trial on the merits to take place.

5. A miscarriage of justice has occurred in the present case, partly because the courts in California allow presumption of prejudice to defendant from delays in prosecution, even when no actual prejudice is or can be shown, or when alleged prejudice is due to factors other than plaintiff's delay in prosecution.

This miscarriage of justice is also partly due to two other related factors, both of which concern whether any actual prejudice to defendant has been caused by delay in service of a complaint, in determining discretionary dismissals.

The first of these factors involves the responsibilities of a public entity to investigate claims for damages, before commencement of a lawsuit, before service of the complaint, and to retain investigation results for possible future litigation.

The second of these factors involves the responsibilities of a common carrier of passengers to investigate following notice of an injury-causing incident, before commencement of any lawsuits, before service of any complaints, and to retain investigation results for possible future litigation.

In the present case, Defendant SCRTD is both a public entity and a common carrier of passengers.

6. While correcting the miscarriage of justice in this case, a reversal of the dismissal would have a beneficial effect on the way public entities handle claims for damages all across the nation.

Irresponsible handling of claims would be discouraged, and fairness and justice would be promoted. A wealth of case law across the nation, which sets forth the purposes of submitting claims for damages to public entities before commencement of lawsuits, would be affirmed and underscored. The likelihood of lower courts freely ignoring such honorable purposes would be diminished. The public, served by countless public entities, would benefit.

6. While correcting the miscarriage of justice in this case, a reversal of the dismissal would have a beneficial effect on the way common carriers of passengers respond to notice of injury-causing incidents throughout the country. Among those who would benefit would be passengers on private transportation who might have the misfortune to collide with a common carrier. All passengers on public transportation, including mass transit and buses, would benefit. Passengers on other common carriers, including airplanes, trains and boats, would also benefit.

For these reasons, Petitioner Jyothi respectfully prays that this Petition for Writ of Certiorari be granted.

Dated: June 23, 1992 Respectfully submitted,

Prema Jyothi

PREMA JYOTHI
Petitioner, In Propria Persona

APPENDIX

APPENDIX NO. 1

IN THE MUNICIPAL COURT OF
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

Case No. 87K30691

ORDER OF DISMISSAL

In Division 07,
Honorable SOUSSAN G. BRUGUERA, Judge Presiding

On motion of the defendant(s):

And pursuant to the provisions of section CCP583.410 CCP *[sic]*,

It is hereby ordered that the above-entitled action is dismissed as follows:

ENTIRE ACTION

Date: 11/08/90

SOUSSAN G. BRUGUERA

Judge/Commissioner
of the Municipal Court

APPENDIX NO. 2

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PREMA GORSHOW *[now JYOTHI]*,	) Superior Ct. No.
	) BV 18933
Plaintiff and Appellant,	) Municipal Court of the
	) Los Angeles Judicial
v.	) Dist. No. 87K30691
	)
SOUTHERN CALIFORNIA RAPID	) **MEMORANDUM**
TRANSIT DISTRICT,	) **JUDGMENT**
	)
Defendant and Respondent.	) *[filed June 13, 1991]*
	)

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The order of dismissal is affirmed. Respondent to recover costs on appeal.

Appellant, who was plaintiff below, appeals from an order of the trial court dismissing her complaint.

The dismissal was ordered pursuant to Code of Civil Procedure section 583.410 (hereafter C.C.P.). That statute grants discretion in trial courts to dismiss actions for delay in prosecution of actions. Code of Civil Procedure section 583.420 provides that a dismissal may be ordered if service of process is not made within two years after commencement or the case is not brought to trial within three years of commencement of the action.

The record reflects that the action was commenced by appellant on July 28, 1987, by the filing of a complaint for personal injury and property damage. An amended complaint was thereafter filed and served on July 27, 1990. This date reflects that service was effected some 2 years and 364 days after commencement of the action and one day prior to three years from commencement.

Thus, appellant failed to serve process within the prescribed two-year period, and the action was not brought to trial within the three-year period, allowing, under the statutes, a dismissal for delay in prosecution in the discretion of the trial court.

Appellant claims that her delay was occasioned by her then attorney substituting out of the case in 1988, and leaving her in propria persona status.

Many other propositions in opposition to respondent's motion to dismiss were urged upon the trial court by appellant.

These propositions did not find favor with the trial court, and dismissal was ordered on November 8, 1990.

On appeal, appellant argues, essentially, a different set of propositions. None of them appear to explain the delay in prosecution of the action, noting that arranging for service of process is no major legal undertaking.

She argues that (1) pursuant to stare decisis lower courts must follow precedents, (2) that the trial judge abused her discretion, (3) and that respondent had repeatedly failed to observe procedures and deadlines and should be estopped from claiming a right to a dismissal as against a pro per party who failed to comply with a discretionary deadline.

She also argues that (1) respondent's reply brief was submitted late in the trial court, (2) that she had filed a statutory claim against respondent within four months after the accident in the case and that by reason of this respondent was not prejudiced by the delay in prosecution.

Appellant argues further on appeal on various other subjects that are not relevant to the issue presented.

The contentions of appellant may be summed up as a claim that her case was meritorious and that respondent was not prejudiced by the delay in prosecution by reason of her timely statutory notice of injury, which afforded it an opportunity to fully investigate the matter and to obtain statements of witnesses and other evidence.

She does not argue on appeal that her propria persona status since 1988 was a cause of the delay, although she contends that she did not know of the time constraints imposed by statute as to prosecution of an action. She argues, as a cause for the delay, that she was recuperating from injuries sustained in the accident.

Appellant cites as authority for her claim that the trial court abused its discretion in three cases, all of which deal with dismissals under the five-year statute.

One of the cases, Dinham *[sic, should be Denham]* v. Superior Court (1970) 2 Cal.3d 557, directs our attention to a principle that is an axiom of California appellate law when claims of abuse of discretion are asserted;

"Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion and unless a clear case of abuse is shown and unless there has been a miscarriage of justice, a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (Id. at p. 566.)

Respondent, of course, contends that the trial court did not abuse its discretion in dismissing the case. We are referred to the cases of Williams v. Pacific Mutual Life Insurance Company (1986) 186 Cal.App.3d 941, and Lombardi v. Citizen's National Trust Bank (1955) 137 Cal.App.3d 206, which cases advise that a party in propria persona status is not entitled to special consideration regarding compliance with rules of procedure.

Even if appellant did not have direct personal knowledge of the discretionary dismissal statutes, she may not rely on her lack of knowledge to excuse her failure to serve the process and to prosecute the action in a timely way.

We do not find an abuse of discretion in the ruling of the trial court. The delay of the appellant is largely unexplained. The contention that respondent was not prejudiced by the delay because it had statutory notice of the claim does not find favor with us. One would not expect a public agency to initiate an investigation upon receipt of a statutory claim as opposed to a summons and complaint. See in this regard County of Los Angeles v. Superior Court (1988) 203 Cal.App.3d 1205, which holds that the filing of a statutory claim does not excuse delay in prosecuting an action in a timely manner.

/Swearinger/
Acting Presiding Judge

We concur.

/Johnson/
Judge

/Disco/
Judge

APPENDIX NO. 3

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PREMA GORSHOW *[now JYOTHI]*,	) Superior Ct. No.
	) BV 18933
Plaintiff and Appellant,	) Municipal Court of the
	) Los Angeles Judicial
v.	) Dist. No. 87K30691
	)
SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,	) **ORDER DENYING**
	) **REHEARING AND**
	) **DENYING**
Defendant and Respondent.	) **CERTIFICATION**
	) *[filed July 16, 1991]*

THE COURT*

The petition of plaintiff for a rehearing after judgment of this court on appeal or, in the alternative, certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

/Swearinger/ /Johnson/ /Disco/

*Before Swearinger, Acting P.J., Johnson, J., and Disco, J. *[sic]*

APPENDIX NO. 4

APPELLATE DEPARTMENT
OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PREMA GORSHOW *[now JYOTHI]*,	Superior Ct. No. BV 18933
Plaintiff and Appellant,	Municipal Court of the Los Angeles Judicial
v.	Dist. No. 87K30691
SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,	**ORDER**
Defendant and Respondent.	*[filed July 23, 1991]*

THE COURT*

It appearing that, through inadvertence and clerical error, the order of July 16, 1991, does not properly reflect the order of the court, said order is vacated and the following order is made:

The petition of plaintiff for a rehearing after judgment of this court on appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

/Swearinger/ /Johnson/ /Disco/

*Before Swearinger, Acting P.J., Johnson, J., and Disco, J. *[sic]*

[Note: Earlier Order filed July 16, 1991, improperly denied certification. Certification had never been petitioned for and therefore could not be denied. Denial of certification blocks the way to Supreme Court review in California. Therefore Petitioner requested that a corrected Order be issued, and this corrected Order was then filed July 23, 1991.]

APPENDIX NO. 5

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT,
DIVISION FOUR

PREMA JYOTHI,	No. B061079
Petitioner,	(Super.Ct.No. BV 18933; Swearinger, J., Johnson, J., Disco, J.)
v.	(Muni.Ct.No. 87L30691; Bruguera, J.)
THE SUPERIOR COURT OF LOS ANGELES COUNTY, APPELLATE DEPARTMENT,	**ORDER**
Respondent,	*[filed Jan. 10, 1992]*
SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT,	
Real Party in Interest.	

THE COURT:*

The petition for writ of certiorari has been read and considered and is denied for absence of facts showing entitlement to extraordinary relief. (See Dvorin v. Superior Court (1975) 15 Cal.3d 648, 650; Randone v. Superior Court (1971) 5 Cal.3d 536, 542-543; Adams v. Superior Court (1971) 8 Cal.App.3d 569, 572.)

/Woods/ /Epstein/ /Cooper/

*WOODS (A.), P.J., EPSTEIN, J., COOPER, J.** *[sic]*
**(Assigned by the Chairperson of the Judicial Council.) *[sic]*

APPENDIX NO. 6

[Case from Court of Appeal]
Second Appellate District,
Division Four,
No. B061079

[California Supreme Court Case No.] S024785

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

[filed March 11, 1992]

PREMA JYOTHI, Petitioner

v.

LOS ANGELES COUNTY APPELLATE DEPARTMENT, Respondent

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT, Real Party in Interest

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Petition for review DENIED.

(stamped) LUCAS
Chief Justice

APPENDIX NO. 7

SUPREME COURT OF THE UNITED STATES

No. A-844

Prema Jyothi, Petitioner

v,

Appellate Department, Superior Court of California, (Southern California Rapid Transit District aka SCRTD, Real Party)

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 29, 1992.

/S/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 13th
day of May, 1992.

APPENDIX NO. 8

SEVENTH AMENDMENT
TO THE UNITED STATES CONSTITUTION

[full text]

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

FOURTEENTH AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES

[full text of Section 1]

"Section 1. All persons born or naturalized in the Unites States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX NO. 9

28 U.S.C.A. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

APPENDIX NO. 10

28 U.S.C.A. § 2675(a)

(UNDER CH. 171, TORT CLAIMS PROCEDURE)

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

APPENDIX NO. 11

CALIFORNIA CODE OF CIVIL PROCEDURE § 340.3 (UNDER TITLE 2 - TIME OF COMMENCING CIVIL ACTIONS, CHAPTER 3 - TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY)

[full text]

§ 340. One year

Within one year:

. . .

3. **Libel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian.** an action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or **for injury to or for the death of one caused by the wrongful act or neglect of another** *[emphasis added]*, or by a depositor against a bank for the payment of a forged or raised check or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl;

[Further subsections do not apply.]

APPENDIX NO. 12

CALIFORNIA CODE OF CIVIL PROCEDURE (CCP) §§ 583.130, 583.210(a), 583.410, and 583.420(a)(1) (UNDER TITLE 8 - OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS, CH. 1.5 - DISMISSAL FOR DELAY IN PROSECUTION)

[full text]

[The following code section is under:]

ARTICLE 1. DEFINITIONS AND GENERAL PROVISIONS.

§ 583.130. Plaintiff to proceed with reasonable diligence; stipulations and disposition of action on merits favored

It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action in construing the provisions of this chapter.

[The following code section is under:]

ARTICLE 2. MANDATORY TIME FOR SERVICE OF SUMMONS

§ 583.210. Time for service and return

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

[The following two code sections are both under:]

ARTICLE 4. DISCRETIONARY DISMISSAL FOR DELAY

§ 583.410. Discretion to dismiss under appropriate circumstances; procedure

(a) The court may in its discretion dismiss an action for delay in prosecution pursuant to this article on its own motion or on motion of the defendant if to do so appears to the court appropriate under the circumstances of the case.

(b) Dismissal shall be pursuant to the procedure and in accordance with the criteria prescribed by rules adopted by the Judicial Council.

§ 583.420. Grounds for dismissal; computation of time

(a) The court may not dismiss an action pursuant to this article for delay in prosecution except after one of the following conditions has occurred:

(1) Service is not made within two years after the action is commenced against the defendant.

[Note: The Motion to Dismiss Petitioner/Plaintiff's complaint in this case was brought by Defendant SCRTD specifically pursuant to CCP § 583.420(a)(1), as per Defendant SCRTD's pleading entitled, "NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO CCP 583.420(a)(1)".]

APPENDIX NO. 13

CALIFORNIA RULES OF COURT (CRC) RULE 373(e)

[full text]

RULE 373.
MOTION TO DISMISS FOR DELAY IN PROSECUTION

. . .

(e) **[Relevant Matters]** In ruling on the motion the court shall consider all matters relevant to a proper determination of the motion, including the court's file in the case and the affidavits and declarations and supporting data submitted by the parties and, where applicable, the availability of the moving and party and other essential parties for service of process; the diligence in seeking to effect service of process; the extent to which the parties engaged in any settlement negotiations or discussions; the diligence of the parties in pursuing discovery or other pretrial proceedings, including any extraordinary relief sought by either party; the nature and complexity of the case; the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case; the nature of any extensions of time or other delay attributable to either party, the condition of the court's calendar and the availability of an earlier trial date if the matter was ready for trial; whether the interests of justice are best served by dismissal or trial of the case; and any other fact or circumstance relevant to a fair determination of the issue. The court shall be guided by the policies set forth in section 583.130 of the Code of Civil Procedure.

APPENDIX NO. 14

CALIFORNIA RULES OF COURT (CRC) RULE 107

[full text]

RULE 107.
REHEARING AND FINALITY OF JUDGMENTS

(a) [Time for rehearing] At any time before a judgment of an appellate department becomes final, as hereinafter provided it may vacate such judgment and order a rehearing.

(b) [When judgment becomes final] Unless a rehearing is ordered, every judgment of an appellate department shall become final as follows:

(1) Upon the expiration of 15 days after the judgment is pronounced, unless a petition for rehearing is filed within that time;

(2) If a timely petition for rehearing is filed, upon the expiration of 30 days after the judgment is pronounced or upon the denial of all such petitions, whichever is earlier.

(3) Where the judgment is modified before it becomes final, as above provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final.

(c) [Petition, answer and determination] A petition for a rehearing shall be served on all adverse parties before filing, and filed within 15 days after the judgment is pronounced, and shall not be filed unless accompanied by proof of service. An answer to the petition may be served on the petitioning party and filed, if accompanied by proof of service, within eight days after service of the petition. If a rehearing is ordered, the appellate department may place the case on the calendar for further argument or submit it for decision.

(d) The periods of time specified in this rule shall be computed as provided in the Code of Civil Procedure, and extended in the cases and to the extent specified by section 12a of said code, but shall not be otherwise extended.

APPENDIX NO. 15

CALIFORNIA GOVERNMENT CODE §§ 911.2 and 913(b) (UNDER TITLE 1, DIVISION 3.6 - CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES)

[full text]

§ 911.2 Time of or presentation of claims

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

§ 913. Notice of board's action on claim.

[(a) is long but not relevant.]

(b) If the claim is rejected in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form

"WARNING

"Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

[§ 945.6 is not reproduced here as it deals with what happens of the agency does not give notice, or if the plaintiff is a prisoner, neither of which apply in this case.]

APPENDIX NO. 16

CALIFORNIA GOVERNMENT CODE § 945.4 (UNDER TITLE 1, DIVISION 3.6 - CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES)

[full text - relevant part in body of section boldfaced]

§ 945.4. Prohibition against suit in absence of presentation of claim and action thereon

Except as provided in Sections 946.4 and 946.6, **no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented** in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division **until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board,** in accordance with Chapters 1 and 2 of Part 3 of this division. *[Emphasis added.]*

APPENDIX NO. 17

CALIFORNIA PENAL CODE § 135 (UNDER TITLE 7 - OF CRIMES AGAINST PUBLIC JUSTICE, CHAPTER 6 - FALSIFYING EVIDENCE, AND BRIBING, INFLUENCING, INTIMIDATING OR THREATENING WITNESSES)

[full text]

§ 135. Destroying or concealing documentary evidence

DESTROYING EVIDENCE. Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor.

APPENDIX NO. 18

EXCERPT FROM STATEMENT OF CASE IN PETITION FOR REVIEW FILED ON JANUARY 21, 1992 WITH THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Quoting from pages 6-9 of the above brief:]

STATEMENT OF CASE

I. Factual and Procedural Background

Petitioner was a passenger on an SCRTD bus which came to a sudden and violent stop on November 11, 1986, due to the negligence of the driver, and possibly the mechanical condition of the bus's brakes. Passenger Petitioner sustained painful injuries to her neck and back, including torn ligaments, vertebrae knocked out of line, and pinched nerves. About two weeks later, on December 1, 1986, while Petitioner was still under medical treatment for these injuries and in a neck brace, she was riding an SCRTD bus home from a doctor's office. Unfortunately, the SCRTD bus in which she was riding again came to a sharp and sudden stop, again severely jolting passenger Petitioner, thus compounding and worsening her injuries.

Petitioner notified SCRTD by telephone within days of the incidents, and at their request later submitted to them a written claim for damages on February 14, 1987, within four months after the injuries occurred. This claim for damages described the time and location of the incidents in sufficient detail to enable SCRTD to identify the bus drivers and individual buses involved. She originally submitted one claim for both incidents, but was later contacted by telephone by an SCRTD claims investigator, who asked her to submit a separate claim for the second incident. She then did so on February 26, 1987. The two claims for damages were later rejected by SCRTD on March 11, 1987 and April 17, 1987, respectively.

Petitioner found legal representation, and on July 28, 1987, her attorney filed a Complaint stemming from the claims for damages. He told her that it was best to wait until all her medical bills were in before serving the Complaint on SCRTD, and told her that the statute of limitations for serving the complaint was three years from the date upon which the complaint had been filed. He

did not mention any earlier deadline.

Petitioner's injuries were painful and slow to heal. The attorney later decided to drop her case, and on April 12, 1988, he substituted himself out--and Petitioner in--as attorney of record for her own case. This came at a time when she was still in the process of recovering from, and receiving treatment for, her injuries.

When she finally received her legal file from her former attorney, she read for the first time the Complaint he had submitted on her behalf. She felt that the Complaint needed to be rewritten before it could be served because as it stood, it did not accurately or adequately represent the situation or her position. She thought the Complaint was "boilerplate" and was not tailored to the specific incidents of her case.

She was still under treatment for her injuries, was not sure what to do, could not find other adequate counsel, and remained in propria persona. She was not in good enough physical condition to undertake the necessary research and revisions to the Complaint.

As a layperson, she relied upon her former attorney's advice. She had no reason to question his knowledgeability, as he was a licensed attorney and she was not. It was only later, after she had been served with Defendant SCRTD's Motion to Dismiss, that she learned that there had been an earlier deadline after which discretionary dismissals became possible.

Her former attorney's advice had been given to her verbally, over the phone and he substituted out of her case well in advance of the earlier deadline after which discretionary dismissals became possible. Therefore he cannot be held responsible for failing to serve the Complaint before the discretionary deadline. Also, his advice was not so much untrue as incomplete. This is not suable misconduct.

When she was finally able to undertake the research and rewriting of her complaint, she did so, and the resulting First Amended Complaint was completed and served on SCRTD on July 27, 1990, within the three-year mandatory statute of limitations.

This was the beginning of a long odyssey of research which Petitioner undertook in order to handle her own case. She has spent long and diligent hours at the UCLA Law Library, researching procedures and cases, and has written all pleadings and briefs for her case, except for the original Complaint. Her educational background is not in law--she has a Bachelor of Fine Arts (BFA). She is a freelance writer, graphic designer and illustrator. She has also worked as a temporary word processing operator, so she has also been able to do any necessary typing for her own papers in this

case. Her knowledge and understanding of the law applicable to this case have increased in proportion to time spent on research and writing for the necessary pleadings and briefs.

II. Causes for Delay in Service

Good causes for delay in service of the First Amended Complaint are summarized as follows:

1. A major shift in representation at a crucial time, while she was still recovering from her injuries, when her attorney substituted out, leaving her in propria persona.

2. Recovering from injuries while in propria persona, which had the same effect as if her representing attorney had been injured (as she was "attorney of record" for her own case). Before the complaint could be served, it had to be rewritten so that it accurately and adequately set forth her case.

3. Reliance upon incomplete advice given to her by her former attorney regarding the deadline for service of a complaint. This mistake was probably inadvertent on his part, and certainly inadvertent on her part. She has requested relief from the courts under CCP §473, which provides for relief from judgment taken by mistake, inadvertence, surprise or excusable neglect, a statutory provision which applies equally to licensed attorneys and in propria persona parties.

4. Confidence that a delay on her part would not adversely affect SCRTD. She had submitted a claim for damages in sufficient detail to enable SCRTD to identify the bus drivers and get their versions of what happened, and to identify and inspect the individual buses. She also assumed that other passengers had complained of the same incidents and that this information would be on file. She assumed that her claims had been investigated before being rejected, as she had been contacted by a claims investigator before the rejection, and that the investigation results would of course be retained.

She knew that SCRTD was aware of the possibility of a court action arising from the claims for damages, as the notices of rejection of her claims also contained written notice of the deadline for filing any related court action. She assumed, as would any other member of the tax-paying public, that SCRTD would responsibly retain records pertaining to claims for the possible court actions which it plainly knew could stem from any claim. She had no idea that SCRTD would later allege to have none of the above information, or that SCRTD would try to blame her for this.

III. Early and Unexplained Destruction of Relevant Records by SCRTD

After service of the First Amended complaint, during the course of subsequent discovery, Petitioner found out by way of interrogatories, requests for production and requests for admission that SCRTD had already destroyed pertinent key records pertaining to her claims, including driving schedules leading to driver identification, and bus maintenance records.

By its own testimony, SCRTD destroyed the pertinent records two years after the incidents. Since the deadline for filing a complaint is one year after the incidents, this meant that the records were destroyed only one year after the deadline for filing the complaint with the court. The statute of limitations for discretionary dismissals is two years after the filing of the complaint. Therefore this destruction of relevant records occurred one year before the expiration of the two-year statute of limitations for discretionary dismissals. The destruction of relevant records also occurred after SCRTD's receipt of Petitioner's claims for damages.

IV. Prejudice to SCRTD Not Due to Delay in Service Beyond Discretionary Deadline

The prejudice of which SCRTD complains is due to its own premature destruction of relevant records. Since this destruction occurred long before the discretionary deadline, it cannot be attributed to delay in service until after the discretionary deadline. In controversy are SCRTD's irresponsible handling of claims investigations and investigation results, and possibly willful destruction of relevant evidence in order to evade responsibility for legitimate grievances.

APPENDIX NO. 19

EXCERPT FROM PETITION FOR REHEARING FILED ON JUNE 25, 1991 WITH THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES

[Quoting from pages 2-3 of the above brief:]

II. WHEN DELAY IN SERVICE HAS OCCURRED, PREJUDICE CANNOT BE PRESUMED FROM THE LENGTH OF THE DELAY ITSELF, IF SERVICE OF THE COMPLAINT OCCURRED WITHIN THE THREE-YEAR MANDATORY STATUTE OF LIMITATIONS FOR SERVICE OF A COMPLAINT.

Contrary to Defendant/Respondent's position, and contrary to ruling in cases cited by Defendant in support of its position, prejudice cannot be presumed from the length of the delay itself. As long as service has occurred within the mandatory statute of limitations for service of a complaint, no "presumption" of prejudice should be made.

If prejudice could be presumed from any delay in service after two years time, and if therefore a case should be dismissed, then the Legislature would have made the mandatory statute of limitations for serving a complaint two years, instead of three. by making the mandatory statute of limitations for serving a complaint three years after the filing of the action, the Legislature made its intent clear: a delay of up to three years is permitted by law.

To "presume" prejudice from any delay in service which is after two years but before three years is to ignore the legislative intent behind CCP §583.210(a), which states: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant."

III. THE ARBITRARY IMPLEMENTATION OF CCP § 583.420 IS UNCONSTITUTIONAL.

Appellant respectfully brings to the Appellate Department's attention that Amendment VII of the United States Constitution

provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This right to a trial on the merits should not be abrogated lightly or arbitrarily. The grounds for such abrogation should be fairly and uniformly applied.

Amendment XIV to the United States constitution also provides that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[Also, quoting from page 13 of the same Petition for Rehearing:]

Appellant wishes to give the Appellate Department reviewing court an opportunity to re-examine its Judgment in light of provisions of the United States Constitution and the California State Constitution, and to correct any errors in its Judgment which may have resulted in violations of Appellant's constitutional rights.

APPENDIX NO. 20

EXCERPT FROM PETITION FOR WRIT OF CERTIORARI FILED ON SEPTEMBER 9, 1991 WITH COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR

[Quoting from Allegations on pages 10-11 of the above brief:]

7.2 The Municipal Court and Appellate Department are in excess of jurisdiction because the arbitrary implementation of CCP §583.420 is unconstitutional. The Seventh Amendment to the United States Constitution provides for a right to a trial in civil suits. This right to a fair hearing on the merits should not be abrogated lightly, arbitrarily, capriciously or unevenly. If this constitutional right is to be abrogated, then this should only be done fairly, uniformly, and with reference to known guidelines which are applied to all persons similarly situated with respect to the legitimate purpose of the laws.

The Fourteenth Amendment to the United States Constitution provides for equal protection of the laws, and the California Constitution, Article 4, §16(a) provides for uniform operation of the laws. If CCP §583.420 is applied arbitrarily or unevenly, then plaintiffs are denied their fundamental constitutional right to a fair trial in a way which denies them equal protection under the laws.

The problem is that persons similarly situated with respect to the legitimate purpose of the laws (regarding discretionary dismissals) are not receiving similar treatment. In particular, there is disagreement among courts of appeal as to the role of prejudice to defendants from delay in prosecution, in determining discretionary dismissals. Some courts state that prejudice can be presumed if the court thinks the plaintiffs' causes for delay are inadequate. Conflicting rulings have resulted, along with concomitant uneven and unequal treatment of plaintiffs and defendants, in violation of constitutional rights.

7.3 A timely claim for damages submitted to a public entity should be considered in assessing prejudice from delay in service of a subsequent complaint. Such a claim for damage enables a public entity to make a prompt and adequate investigation of the claim.

7.4 A public carrier, and possibly any public agency, has a duty to preserve evidence for use in future litigation, relating to known accidents or claims for damages. A public carrier, in particular, has this responsibility. A public carrier should not be allowed to destroy such evidence and pertinent information before the expiration of the statutes of limitations for service, and then later blame the resulting prejudice (from lack of the same records) on plaintiffs.

[Also, quoting from the Memorandum of Points and Authorities in the same Petition for Writ of Certiorari, pages 23-32:]

IV. THE MUNICIPAL COURT AND APPELLATE DEPARTMENT ARE IN EXCESS OF JURISDICTION BECAUSE THE IMPLEMENTATION OF CCP §583.420, ALONG WITH CRC RULE 373(e) IS UNCONSTITUTIONAL WITHOUT FURTHER CLARIFICATION FROM A HIGHER COURT.

Both the United States Constitution and the California State Constitution guarantee to all citizens the right to a fair trial. This right should not be abrogated capriciously or arbitrarily.

Amendment VII to the United States Constitution states:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The California State Constitution, Article 1, §16 states:

"Trial by jury is an inviolate right and shall be secured to all."

Since this is a constitutionally guaranteed right, if it is abrogated, this should only be done in a way which provides for uniform application of laws, and which provides equal protection under the laws.

the California State Constitution, Article 4, §16(a), provides that:

"All laws of a general nature have uniform operation."

Amendment XIV to the United States provides that no State shall:

"deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The California State Constitution, Article 1, §7(a) also provides:

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

With regard to the present case, it should be noted that CCP §583.420, the statute for discretionary dismissals, can and does abrogate a citizen's right to fair trial. Therefore it is of critical importance that the courts which implement this statute do so in a way which is not arbitrary, capricious, or contradictory, but instead in a way which is fair and uniform, providing citizens with equal protection under the laws.

In Brown v. Merlo (1973), 8 C.3d 855, the Supreme Court stated at 861:

> "This principle of 'equal protection' preserved by both state and federal Constitutions, of course, 'does not preclude the state from drawing any distinctions between different groups of individuals', [cite omitted] but it does require that, at a minimum, 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'"

However, plaintiffs whose cases come up for possible dismissal under CCP §583.420 are similarly situated with respect to the legitimate purpose of the law, and yet they do not receive like treatment.

Apparently, the only guidelines currently in existence for evaluating discretionary dismissals are the "relevant matters" set forth in CRC Rule 373(e). However, the "relevant matters" listed therein do not provide enough guidance to the courts to prevent the widespread, arbitrary use and abuse of discretion, which results in violations of plaintiffs' constitutional rights.

CRC Rule 373(e) does not even touch upon the important issue of the role of prejudice from delay in determining a discretionary dismissal. The only "relevant matter" listed which could be deemed to include the point is "any other fact or circumstance relevant to a fair determination of the issue."

However, this is so broad that courts of appeal have taken contradictory stances on the role of prejudice from delay in determining discretionary dismissals. There is no uniformity of decision among courts of appeal on this issue.

One court may say that the existence of prejudice from delay should make no difference in determining a discretionary dismissal, while another court may rule for discretionary dismissal mainly on the basis of presumed but unproven prejudice from delay.

In particular, it should not be possible for prejudice to be presumed from the length of the delay itself, when the delay is within the allowable mandatory statutes of limitations, as established by the legislature.

According to CCP §583.210(a), "The summons and complaint

shall be served upon a defendant within three years after the action is commenced against the defendant."

Although CCP §§583.410 and 583.420 allow some latitude for discretionary dismissals, it should not be possible to "presume" undemonstrated, unshown and unproven prejudice merely from the length of the delay itself, if the delay is within the mandatory statute of limitations set forth in CCP §583.210(a). To presume prejudice from a delay which is still within the allowable three-year period would be to make the two-year discretionary dismissals statute into a mandatory statute. If the legislature thought that prejudice could be presumed from any delay greater than two years, then it would have enacted a two-year limitation for the mandatory statute.

If prejudice could be presumed although not shown, then good cause could also be presumed but not shown. If cause has to be shown, then prejudice should also have to be shown, and not simply imagined to be present if a judge doesn't happen to like a plaintiff's cause for delay.

In Lopez v. Larson (1979), 91 C.A.3d 383, the court held that with regard to delay in bringing an action to trial, "prejudice to a defendant . . . is **presumed** when such delay is unjustified." (Emphasis added.) (Id. at 386.) So, with puzzling illogic, this court "presumed" the existence of undemonstrated prejudice to the defendant from the mere fact that the court did not think the plaintiff's cause for delay was good enough.

The Lopez rulings on presumption of prejudice from delay do not take into account the formal legal definition of "presumption". Evidence Code §600(a) defines a presumption as follows:

> "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence."

Under this definition of presumption, prejudice from a delay, when the delay is within the length of time permitted by statutory law, would not be a valid presumption. The law cannot "require" an assumption of prejudice from a delay which the law itself permits.

Evidence Code §606 states:

> "**Effect of presumption affecting burden of proof.** The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the non-existence of the presumed fact."

To presume prejudice to defendant from a judicially allowable

delay in service (within the mandatory statute of limitations) is therefore to throw upon the plaintiff the burden of proving the non-existence of prejudice from such delay, an unfair burden.

Why "presume" the existence of prejudice from delay when such prejudice may or may not exist? The court is there to fairly consider all allegations placed before it by both sides on any issue. And with discretionary dismissals, if there is any doubt, this should be resolved in favor of allowing a trial on the merits.

What weight should cause for delay have in determining a discretionary dismissal? CRC Rule 373(e) does not say that only if a cause for delay pleases the court, then all other relevant matters are to be considered. Diligence of plaintiff is listed as one of many factors, all of which are to be considered together by the trial court.

Yet without justification, many courts consider only diligence, and if a plaintiff's causes for delay do not please them, then they deem that no other factors need to be considered at all. The cases are dismissed. This is in conflict with CRC Rule 373(e), which states "the court shall consider all matters relevant to a proper determination of the motion."

> In Lopez v. Larson, the Court of Appeal stated at 406:
> "However, in the case at bench the court expressly stated in the judgment of dismissal its finding that '[p]laintiff has not shown sufficient or good cause for the lengthy delay.' **That alone was a sufficient basis for the judgment of dismissal."** (Emphasis added.)

In contrast, the Denham court at 566 quoted Loomis v. Loomis (1960), 181 C.A.2d 345, as saying:

> "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, **all of the circumstances before it being considered.**" (Emphasis added.)

. . .

According to the Lopez court, if the plaintiff's causes for delay are inadequate, then other factors such as prejudice to defendant from the delay need not be considered. Such prejudice need not be shown but instead can be presumed if a plaintiff's cause for delay is not deemed adequate.

What about the perspectives of justice? When undemonstrated prejudice from delay can be "presumed", then justice sometimes falls by the wayside. The plaintiff in Lopez was a poor farm worker who did not even speak English. He had turned to his union, United Farm Workers (UFW), to protect him when his employer fired him for joining the UFW. The busy UFW attorneys,

representing a multitude of plaintiffs, accidentally let the deadline slide for service of the complaint in his case. The complaint was served within the mandatory deadline for service, but not within the discretionary deadline. No prejudice was shown to defendants from the delay. Prejudice was instead "presumed".

In affirming the dismissal, and in abrogating the plaintiff's constitutional right to a fair trial, the Lopez Court of Appeal remarked crustily at 405, "if the plaintiff's action had merit, he has a remedy against his attorneys."

How likely is it that an impoverished farm worker would be willing or able to sue his attorneys, when these attorneys were working on behalf of his union? Especially when his union was all that stood between him and the unscrupulous actions of the growers who employ the fruit-pickers and vegetable-pickers in any harvesting jobs they may ever hold?

Marie Antoinette, a queen of England, is reputed to have been told that the peasants had no bread to eat, and she is reputed to have responded, "Then let them eat cake."

There are similarities here. Did the busy UFW legal staff accidentally let a deadline for discretionary dismissal slip by in one of their many cases? Then let Mr. Lopez sue his attorneys. (How do you say that in Spanish?) His constitutional right to a fair trial was abrogated in part by the presumption of undemonstrated prejudice from delay in prosecution. . . .

The exercise of discretion by judges in ruling on discretionary dismissals is presently both arbitrary and non-uniform, especially with regard to whether prejudice to defendant from delay in prosecution should be considered as a factor, and the presumption of undemonstrated prejudice from delay. Therefore, citizens may be deprived of their constitutional right to a fair trial on the mere whim of a judge, and the decision can only be held up against conflicting case law in trying to determine the fairness or unfairness of a decision, or the use or abuse of discretion.

How about accidentally eating burnt toast in a hurried breakfast on the day the decision is made? Is that a good reason for granting a dismissal? Why not? What if a judge doesn't happen to like women who wear red with purple, or people who have colds and stutter, or Cambodian refugees who bring crying babies with them into court because they can't afford babysitters--are these good reasons?

How uniform is whim and fancy? Is this uniform application of the laws and equal protection of the laws? In fact, it is arbitrary

and immeasurable violation of constitutional rights.

In operation, the present implementation of CCP §583.420, which can and does abrogate citizens' constitutional right to a fair trial, is not uniform and does not provide for equal protection under the laws. Because this is in violation of constitutional rights, it is therefore in excess of jurisdiction.

In Abelliera v. District Court of Appeal (1941), 17 C.2d 280, the Supreme Court held:

> "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, and in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

APPENDIX NO. 21

EXCERPT FROM PETITION FOR REVIEW FILED ON JANUARY 21, 1992 WITH THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Quoting from Issues in Controversy, pp. 3-4 of the above brief:]

3. In ruling on discretionary dismissals, are California Courts of Appeal currently abrogating plaintiffs' fundamental constitutional right to a trial by jury in a way which violates other constitutional provisions for equal protection under the law, and uniform operation of the laws?

The essence of this constitutional challenge is as follows.

Conflicting lines of Court of Appeal decisions have developed concerning the proper role of prejudice to defendant from delay in prosecution, in determining discretionary dismissals. Judges are abusing their discretion by refusing to even consider this factor simply because it is not specifically listed in CRC Rule 373(e). This large loophole in CRC Rule 373(e) is the cause of much of the unconstitutional chaos.

The resulting confusion and conflict have caused widely differing and arbitrary treatment of similarly situated plaintiffs. Persons similarly situated with respect to the legitimate purposes of the law have not been receiving like treatment. This violates constitutional provisions for equal protection and uniform application of laws.

It must be remembered that **the right to trial by jury is a fundamental constitutional right which is abrogated when a case is dismissed without being heard on its merits.** Therefore it is of utmost importance that if a case is dismissed, this is done in accord with the constitutional provisions for equal protection and uniform application of laws. Failure on the part of the lower courts to do this should be strictly scrutinized.

Petitioner does not argue that all dismissals are unconstitutional, but simply that the present implementation of dismissals has become unconstitutional and will remain so until the Supreme Court intervenes by way of precedent-setting clarification.

In controversy are Amendments VII and XIV to the United States Constitution, providing for the right to trial by jury in civil

suits, and equal protection of the laws, respectively; and in the California State Constitution, Article 1, §§16 and 7(a) and Article 4, §16(a), providing for trial by jury, equal protection, and uniform operation of laws, respectively.

. . .

[Also, quoting from Supporting Arguments in the same Petition for Review, pages 16-18:]

V. TANGLES IN THE JUSTICE DELIVERY SYSTEM HAVE BROUGHT IT INTO CONFLICT WITH CONSTITUTIONAL PROVISIONS.

Both Amendment XIV to the United States Constitution, and California State Constitution, Article 1, §7(a), guarantee equal protection of the laws to all citizens.

In Brown v. Merlo (1973), 8 C.3d 855, 506 P.2d 212, the Supreme Court stated at 861:

> "This principle of 'equal protection' preserved by both state and federal constitutions . . . does require that, at a minimum, 'persons similarly situated with respect to the legitimate purpose of the law receive like treatment.'"

However, although plaintiffs whose cases come up for possible dismissal under CCP §583.420 are similarly situated with respect to the legitimate purpose of the law, they do not receive like treatment. Widely varying views and rulings with respect to whether prejudice to defendants from delay in prosecution should even be considered, or whether such prejudice can be presumed, have resulted in widely uneven and dissimilar treatment of similarly situated plaintiffs.

This also violates California State Constitution, Article 4, §16(a), which provides for uniform operation of the laws.

The issue in controversy here involves a fundamental constitutional right: the right to a trial by jury.

American Jurisprudence holds that:

> "The right to have a trial by jury is a fundamental right in our democratic judicial system, including our federal jurisprudence. It is a right which is justly dear to the American people, and whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care." (47 Am.Jur.2d 635.)

Dismissal of a case does abrogate the fundamental constitutional right to trial by jury which is set forth in Amendment VII to the United States Constitution, and also set forth in the California State Constitution, Article 1, §16. It is of critical importance, if a fundamental constitutional right is to be abrogated, that this be done in a way which is in accordance with--not in violation of--other constitutional provisions. Failure on the part of the lower courts to do this should be strictly scrutinized.

Judicial decisions which are not in accord with constitutional provisions are in excess of jurisdiction, and an abuse of discretion.

In Abelliera v. District Court of Appeal (1941), 17 C.2d 280, 109 P.2d 942, the Supreme Court stated at 291:

> 'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari."

In cases involving discretionary dismissal, judges are accorded a certain amount of discretion. However, as expressed by the Gleneagle court at 561:

> "Although discretion is vested in the trial judge, that discretion is not unfettered. It cannot be exercised arbitrarily, but must be an impartial discretion to be exercised in conformity with the spirit of the law and in a manner to subserve the ends of substantial justice."

The legislature acknowledged that its list of specific factors in CRC 373(e) could be incomplete, by including on the list "any other fact or circumstance relevant to a fair determination of the issue."

In practice, as Courts of Appeal have handed down rulings on discretionary dismissals, it has evolved that there is at least one glaring omission from the CRC Rule 373(e) list of specific factors: the presence or absence of affirmatively shown prejudice to defendant from delay in prosecution.

Because this factor is not specifically listed, some judges refuse to consider it as a relevant factor, even when requested to do so by plaintiffs' attorneys. Even though this factor is "relevant to a fair determination of the issue," as per CRC Rule 373(e), it is brushed off by some judges as insignificant and something they do not choose to even consider.

Yet failure or refusal on the part of judges to consider this as a relevant factor, along with all other relevant factors, has resulted in widely varying treatment of plaintiffs who are similarly situated with respect to the legitimate purposes of the laws.

Only by closing up this large loophole in CRC Rule 373(e) will cases involving discretionary dismissal be handled in a fair and evenhanded way.

The Supreme Court is hereby requested to rule that judges be required to consider, as a relevant factor under CRC 373(e), along with all other relevant factors, the presence or absence of any affirmatively shown prejudice to defendant, attributable to plaintiff's delay beyond the discretionary time limit.

Clarification from the Supreme Court is needed to ensure that if a plaintiff's fundamental constitutional right to trial is to be abrogated, this is done in accordance with other constitutional provisions for equal protection under the laws, and uniform application of the laws. These tangles in the justice delivery system can be straightened out by Supreme Court intervention.

APPENDIX NO. 22

REFERENCE LIST OF RULINGS BY SUPREME COURTS OF STATES AND U.S. COURTS OF APPEAL ON PREJUDICE FROM DELAY IN PROSECUTION IN DISCRETIONARY DISMISSALS

Anderson v. Air West, Inc., 542 F.2d 522 (1976, 9th Cir.) at 524:

> "This court has consistently held that the failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the absence of a showing of actual prejudice to the defendant from the failure. . . . The law presumes injury from unreasonable delay. . . . . However, this presumption of prejudice is a rebuttable one and if there is a showing that no actual prejudice occurred, that factor should be considered when determining whether the trial court exercised sound discretion."

Bagalay v. Lahaina Restoration Foundation,

(1978) 588 P.2d 416 (Supreme Court, Hawaii) at 416:

> "Where delay in prosecuting case results in actual prejudice to defendants and where it is shown that plaintiff's counsel deliberately delayed prosecuting case, dismissal would not constitute an abuse of discretion."

Becky v. Norwest Bank Dillon, N.A.,

(1990) 798 P.2d 1011 (Supreme Court, Montana), at 1012:

> "Elements which reviewing court will consider when determining whether a district court has abused its discretion by dismissing an action for failure to prosecute are: plaintiff's diligence in prosecuting his claims, prejudice to defense caused by plaintiff's delay, availability of alternate sanctions, and existence of a warning to plaintiff that his case is in danger of dismissal.
>
> . . . [O]nce delay has been shown, plaintiff must proffer a reasonable excuse for the delay; an unreasonable delay raises a presumption of prejudice and defendant is under no obligation to demonstrate injury from the delay, but if plaintiff comes forward with a reasonable excuse for the delay, burden shifts to defendant to show actual prejudice."

Bonhiver v. Fugelso, Porter et al.,

(1984) 355 N.W.2d 138 (Supreme Court, Minn.) at 138:
"Dismissal for failure to prosecute is appropriate only when delay prejudiced the defendants, and delay was unreasonable and inexcusable."

Bush v. U. S. Postal Service, 496 F.2d 42 (1974, 4th Cir.) at 44:
" Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. . . . Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal. . . . [G]enerally lack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion."

Chicago Title Insurance Co. v. Wheat,

(1985) 699 P.2d 597 (Supreme Court, Montana) at 598:
"Where an unreasonable delay has occurred, burden rests upon plaintiff to come forward and demonstrate an excuse for his inaction; prejudice due to unreasonable delay is presumed."

Citizens Utilities Co. v. American Tel. & Tel. Co.,

595 F.2d 1171 (1979, 9th Cir.) at 1171:
"In deciding motion to dismiss for want of prosecution, although prejudice to defendants may be presumed from 'unreasonable' delay, whether actual prejudice exists may be an important factor in deciding whether a given delay is 'unreasonable'."

Cook v. Fergus Electric Cooperative,

(1988) 765 P.2d 1138 (Supreme Court, Montana) at 1138:
In determining whether to dismiss case for failure to prosecute, court must balance plaintiff's reasonable excuse, where it finds unreasonable delay, against prejudice caused to defendant by delay; however, if court finds unreasonable delay exists, law presumes impairment of defendant's defenses."

Cosme Nieves v. Deshler, 826 F.2d 1 (1987, 1st Cir.) at 1:

"District court's sua sponte dismissal of action for back pay and overtime for want of prosecution was too harsh a sanction . . . since defendants were not prejudiced by delay."

Cox v. Myllmaki,

(1988) 752 P.2d 1093 (Supreme Court, Montana) at 1093:

"Plaintiff's diligence in pursuing action must be considered in light of unreasonable delay, prejudice to the defendant, and existence of excuse for delay when ruling on motion to dismiss for failure to prosecute. . . . Where there is unreasonable delay in proceeding with a case, prejudice to defendant is presumed and plaintiff must show an excuse for the inactivity; burden shifts when reasonable excuse is presented."

Day v. Ciba Geigy Corp.,

(1989) 772 P.2d 222 (Supreme Court, Idaho) at 223:

"In its deliberations on dismissing case because of failure to prosecute diligently, trial should consider length of delay occasioned by plaintiff's failure to prove case, any justification for delay, and resultant prejudice to defendant. . . . It is abuse of discretion to use power of dismissal to punish period of delay which no longer exists if defendant has not established prejudice resulting from delay."

Dept. of Social Services v. Romero,

(1980) 609 P.2d 1323 (Supreme Court, Utah) at 1324-5:

"In support of the trial court's refusal to grant his motion to dismiss, . . . there is no realistic basis upon which to conclude that the defendant changed his position or was adversely affected by the delay. . . . [W]e are not convinced that the trial court abused its discretion, or committed any error, which resulted in injustice to the defendant."

Duncan v. Pennington County Housing Authority,

(1986) 382 N.W.2d 425 (Supreme Court, S. Dakota) at 425:

"Prejudice, or lack thereof, to defendant, is a consideration when deciding motion to dismiss for failure to prosecute."

Ellis v. Twin Falls Canal,

(1985) 712 P.2d 611 (Supreme Court, Idaho) at 611:
"Unreasonable delay creates presumption of prejudice to defendant's case."

Equal Employment Opportunity Comm. v. Westinghouse,

592 F.2d 484 (1979, 8th Cir.) at 484:
"In order to obtain dismissal of an EEOC complaint because of delay, the defendant must establish with such clarity as to leave no room for controversy that it has been substantially and unduly prejudiced in its ability to defend that lawsuit because of the delay."

Evans v. Gogo,

(1990) 407 S.E.2d 361 (Supreme Court, W. Virginia) at 361:
"Involuntary dismissal for failure to prosecute should only occur when there is lack of diligence by a plaintiff and demonstrable prejudice to defendant. . . . [W]e must examine the reasons given for the delay, and the possible prejudicial effect of the delay on the defendants."

Fidelity S. & L. Ass'n v. Aetna Life & Cas. Co.,

647 F.2d 933 (1981, 9th Cir.) at 934:
"District court did not abuse its discretion in denying insurer's motion to dismiss action to recover on standard savings and loan blanket bond for want of prosecution, where insurer made no showing of prejudice."

Gray v. Johnson,

(1980) 267 S.E.2d 615 (Supreme Court, W. Virginia) at 616:
"Involuntary dismissal for failure to prosecute should only occur when there is a lack of diligence by plaintiff and demonstrable prejudice to defendant."

Hillig v. C.I.R., 916 F.2d 171 (1990, 4th Cir.) at 173:
"'While the power to dismiss clearly lies with the district courts, it is appropriately exercised only with restraint. "Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits."' . . . This Circuit requires that the trial court consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn

out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal."

K.L.C. Inc. v. McLean,

(1982) 656 P.2d 986 (Supreme Court, Utah) at 988:

"Nonetheless, we repeated the basic factors that justify dismissal as follows:

1. The conduct of both parties.
2. The opportunity each has had to move the case forward.
3. What each of the parties have done to move the case forward.
4. What difficulty or prejudice may have been caused to the other side.
5. And, most important, whether injustice may result from the dismissal."

Lyell Theatre Corp. v. Loews Corp.,

682 F.2d 37 (1982, 2nd Cir.) at 43:

"Plaintiff's duty of due diligence is imposed because of the strong policy favoring prompt disposition of cases. Prejudice to defendants resulting from unreasonable delay may be presumed, . . . but in cases where delay is more moderate or excusable, the need to show actual prejudice is proportionally greater."

Mir v. Fosburg, 706 F.2d 916 (1983, 9th Cir.) at 918:

"The pertinent question, therefore, is whether there has been delay and prejudice to the defendants sufficient to justify dismissal with prejudice. . . . Thus, the precise question on appeal is whether there is evidence of prejudice to the defendant . . . that would justify dismissal of appellant's suit with prejudice. We have reviewed the record . . . We cannot find in these documents allegations of prejudice occasioned by delay during the relevant period sufficient to justify the drastic sanction of dismissal with prejudice."

Monahan v. Washburn,

(1987) 507 N.E.2d 1045 (Supreme Court, Mass.) at 1047:

"Involuntary dismissal is a drastic sanction which should be utilized only in extreme situations. As a minimal requirement, there must be convincing evidence of unreasonable conduct or delay. A judge should also give

sufficient consideration to the prejudice that the movant would incur if the motion were denied, and whether there are more suitable alternatives. Concern for the avoidance of a congested calendar must not come at the expense of justice. The law strongly favors a trial on the merits of a claim. . . . The record does not contain any showing that the defendants would have been prejudiced by a continuance or that the judge considered an alternative penalty. . . . The plaintiff's legitimate illness was beyond his control and to penalize him severely for it would be a serious injustice without consideration of alternatives."

Moore v. Telfon Communications Corp.,
589 F.2d 959 (1978, 9th Cir.) at 967-8:
"Failure to prosecute diligently alone justifies dismissal, even where actual prejudice to the defendant is not shown. . . . Although no showing of actual prejudice was made, prejudice is presumed from unreasonable delay."

Nealy v. Transportacion Maritima Mexicana,
662 F.2d 1275 (1980, 9th Cir.) at 1279:
"We have held that 'the failure to prosecute diligently is sufficient by itself to justify a dismissal,' . . . that '[u]nreasonable delay creates a presumption of injury to appellees' defenses,' . . . and that 'whether *actual* prejudice exists may be an important factor in deciding whether a given delay is "unreasonable,"'. . . The pertinent question for the district court, then, is not simply whether there has been any, but rather whether there has been *sufficient* delay or prejudice to justify a dismissal of the plaintiff's case. Even where a plaintiff has failed to do what he might have done earlier, he may have an explanation that excuses or justifies his failure. It is at this point that the extent of prejudice to the defendant, if any, becomes important. . . . Thus, delay alone should not be deemed to create a '"presumption of prejudice," save in the sense that if the plaintiff proffers no pleading or presents no proof on the issue of [reasonableness], the defendant wins.' . . . Fairness dictates, however, that a plaintiff not be deprived of his cause of action if the missing evidence would have been lost even absent delay. Rather, the loss must in some way be causally related to the plaintiff's conduct. In summary, where a plaintiff has come forth with an excuse for his delay that is anything but frivolous, the burden of

production shifts to the defendant to show at least some actual prejudice. . . . Where a delay has not been unreasonable, where the defendant has suffered no actual prejudice, or where the plaintiff has cured his lapse in state court and been diligent in prosecuting his action following removal, the policy in favor of deciding cases on their merits should prevail over those which would favor dismissal."

Olympic Sports Products v. Universal Athletic Sales Co.,
760 F.2d 910 (1985, 9th Cir.) at 915:
"[I]n considering dismissal under the rule the court will consider whether the plaintiff has prosecuted the action diligently and to what extent any delay has prejudiced the defendant."

Peters v. Newkirk,
(1981) 633 P.2d 1210 (Supreme Court, Montana) at 1210:
"Prejudice to defendant due to unreasonable delay in prosecuting lawsuit is presumed."

Power Constructors v. Acres American,
(1991) 811 P.2d 1052 (Supreme Court, Alaska) at 1052:
"Defendants, seeking dismissal of action for failure to prosecute, need not show prejudice for delay when delay is unreasonable; prejudice or lack of it is factor that may be considered by court, however, in case of moderate or excusable neglect."

Randolph v. Hays,
(1983) 665 P.2d 500 (Supreme Court, Wyoming) at 500-501:
"Trial court abused its discretion in denying motion to reinstate action which had been dismissed for alleged lack of prosecution, given . . . there was no showing that defendant had been prejudiced."

Reizakis v. Loy, 490 F.2d 1132 (1974, 4th Cir.) at 1135:
"Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits. . . . [L]ack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion."

Scherer v. Hanson,

(1978) 270 N.W.2d 23 (Supreme Court, Minn.) at 23:
"Before action should be dismissed for failure to prosecute, it must be shown that delay prejudiced defendant, and that delay was unreasonable and inexcusable."

Shackleton v. Neil,

(1983) 672 P.2d 1112 (Supreme Court, Montana) at 1112:
"[A]n action may be dismissed for failure to prosecute it with due diligence, absent a sufficient showing of excuse. . . . Furthermore, there is no burden on the defendant to show injury by the delay. When the plaintiff has slept on a case for a long period of time, the law presumes injury and places the burden on the plaintiff to show good cause for the delay. . . . We have specifically recognized that an unreasonable delay raises a presumption of impairment of defendant's defenses."

Sickler v. National Dairy Products Corp.

(1977) 367 N.E.2d 674 (Supreme Court, Illinois) at 677:
"The record does not show that the delay . . . was prejudicial to any of the defendants. Applying the test . . . as to whether or not substantial justice is being done between the litigants, we hold that the circuit court erred in dismissing the action."

State Ex Rel. Webster v. Lehndorff Geneva,

(1988) 744 S.W.2d 801 (Supreme Court, Missouri) at 802-4:
"Failure of foreign corporation to support its claim . . . precluded showing of prejudice sufficient to require dismissal of divestitute suit for nonprosecution. . . . Appellants acknowledge that delay alone does not require dismissal for failure to prosecute. . . . [T]he trial court could have found that defendants, who quietly accepted the benefits of ownership of the farmland, suffered no prejudice and should not now be heard to complain of the delay."

Systems Associates v. Motorola Com. and Elec.,

(1989) 778 P.2d 737 (Supreme Court, Idaho) at 737:
"In its deliberations over whether to dismiss case for failure to prosecute diligently, trial court should consider length of delay occasioned by plaintiffs' failure to move case, any justification for delay, and resultant prejudice to defendant."

Timber Tracts v. Fergus Electric Cooperative,
(1988) 753 P.2d 854 (Supreme Court, Montana) at 855:
"Burden, after defendant's filing of motion to dismiss for failure to prosecute is upon plaintiff to demonstrate reasonable excuse for his neglect, and if plaintiff fails to carry that burden, delay is considered unreasonable, and defendant is presumed to have been prejudiced."

Unemployment Compensation Division v. Bjornsrud,
(1977) 261 N.W.2d 396 (Supreme Court, N. Dakota) at 397:
"Dismissal for lack of prosecution is a harsh remedy and should be resorted to only in extreme cases. . . . [T]rial court acted within the range of its discretion in denying motion to dismiss. . . there was no showing of prejudice."

Utah Oil Company v. Harris,
565 P.2d 1135 (1977, Supreme Court, Utah) at 1135-37:
In determining whether case should be dismissed with prejudice for failure to diligently prosecute, court should consider conduct of both parties, opportunity each had to move the case forward, what each of parties have done to move case forward, what difficulty or prejudice may have been caused to the other side, and whether injustice would result from the dismissal. . . . Applying the foregoing rules to the case at hand . . . no prejudice to defendants' position is evident while serious injustice may well exist as a result of the dismissal.

Washington v. Walker, 734 F.2d 1237 (1984, 7th Cir.) at 1237:
""'Prejudice' necessary to warrant dismissal for failure to prosecute may be presumed from unreasonable delay. . . . [S]howing of prejudice to defendants is not required."

Westinghouse Elec. Supply v. Paul W. Larsen Contr.,
(1975) 544 P.2d 876 (Supreme Court, Utah) at 879:
"Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may

result from the dismissal. . . . It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them."